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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~311~~ 51

MICHAEL STACHELBERG AND MOSES KIND, COPARTNERS AS STACHELBERG & COMPANY, APPELLANTS,

vs.

ERNESTO PONCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

FILED SEPTEMBER 28, 1885.

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INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	1	1
Amendment to bill	9	6
Note as to issuance and service of subpœna, &c.	11	7
Answer	12	7
Replication	16	10
Evidence for complainants	17	11
Deposition of Michael Stachelberg	17	11
William Wicke	40	27
Isaac Bijur	47	30
Moses Kind	60	39
Michael Flood	67	43
Louis S. Frank	73	47
Otto Heppenheimer	75	49
Wm. H. Thomas	81	52
Moses Kind (recalled)	83	54
Michael Stachelberg (recalled)	84	54
Fred. W. Foster	85	55
Edward J. Doyle	93	60
John James Eaton	96	62
Complainants' Exhibit—A. H. D., Ex'r, letter of Cotton to Estabrook & Eaton, Nov. 9, 1882	112	73

JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 23, 1888.

	Original.	Print.
Deposition of Moses Kind (recalled)	113	73
Frank W. Kinsman, Jr.	116	75
Frank O. Merrill	121	78
Wendel Kirsch	123	79
Evidence for defendant	125	80
Deposition of Ernesto Ponce	125	80
Respondent's Exhibit D—Advertisement of E. Ponce	138	89
E— " " "	139	89
Complainants' Exhibit 4—Affidavit of E. Ponce, Jan. 12, 1883	140	90
Deposition of Lorenzo P. Benet	143	92
Manuel Caro	150	96
Complainants' Exhibit 5—A. H. D., Ex'r, affidavit of Manuel Caro, Jan. 10, 1883	154	99
Deposition of Solomon M. Hyams	154	99
Solomon Mathias	166	106
David Fonseca	169	108
Additional evidence for complainants	181	116
Deposition of George W. Nichols	181	116
Solomon Gershel	184	118
Isaac Hamberger	190	122
Marcus Oppenheimer	194	124
Julius Hilborn	197	126
Elias Spingarn	203	130
Moses Kind (recalled)	211	135
Additional evidence for defendant	212	136
Deposition of Julius M. Cohen	212	136
Final decree	216	139
Petition for appeal	216½	139
Allowance for appeal	217	139
Appeal bond	217	139
Clerk's certificate	221	140
Opinion of the court	222	141
Citation	226	142
Proof of service of citation	227	143

1 Circuit Court of the United States, District of Maine. Maine District, First Circuit.

At a term of the circuit court of the United States for the first circuit, begun and held at Portland, within and for the district of Maine, on Tuesday, the twenty-third day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Before Hon. Le Baron B. Colt, circuit judge.

Record and Proceedings.

MICHAEL STACHELBERG *et al.* } No. 308.
v.
ERNESTO PONCE.

On the 30th day of December, A. D. 1882, Clarence Hale, Esq., solicitor, filed the following bill of complaint:

To the honorable judge of the circuit court of the United States for the district of Maine:

Michael Stachelberg and Moses Kind, both of the city, county, and State of New York and citizens of said State of New York, copartners doing business in said city under the name and style of M. Stachelberg & Company, bring this their bill against Ernesto Ponce, of Portland, in the county of Cumberland and State of Maine, and a citizen of said State of Maine.

And thereupon your orators complain and say that one Asher Bijur, of New York, in said State of New York, after having
2 spent much time and incurred great expense in learning and acquiring the art, for many years, to wit, from the year 1858 to the year 1865, was engaged in manufacturing and packing cigars of various grades and shapes; that he made certain of these cigars of superior material, and put them up in boxes containing two hundred and fifty each. Said cigars were called by him "La Normandi" cigars, and the boxes containing them were labeled and branded "La Normandi;" that said cigars so called became widely known under said name, and, being of fine stock and skillfully made and of a shape that pleased the eye, gained great favor and popularity everywhere, and particularly in the New England States, as your orators are informed and believe.

And your orators further show that said words "La Normandi" and "Normandi," or either of them were never before that time known or used as aforesaid by any person or persons engaged in cigar manufacture, packing, or sale, but that said Bijur used them as a trade-mark to designate the cigars of said description made and sold by him, and was always, up to the time of the assignment hereinafter set forth, entitled to the exclusive right to the use of said words in manner and for the purpose aforesaid; and your orators further show that said Bijur duly and legally assigned, sold, transferred, and conveyed unto your orator, Michael Stachelberg, his heirs and assigns, all his right, title, and interest in and to the exclusive use of said words or names "La Normandi" and "Nor-

mandi," and that he made said assignment on or about the first day of February, 1865; that on or about the first day of January, 1873, your orators formed the copartnership firm of M. Stachelberg & Co., said trade-mark becoming their joint property.

And your orators further show that, since said assignment, they have been engaged in manufacturing cigars under said names "La Normandi," and have bestowed great care upon the packing of said cigars under said names, and have had them put up in boxes
3 containing 250 each and branded them with the name "La Normandi," and have caused the cigars so named to be extensively advertised, and have spared no expense to have them known to the public, and have had their agents throughout the various States of the United States and the various provinces of the Dominion of Canada calling the attention of the public to the superior merits of the "La Normandi" cigars, which name gradually became very popular and a source of great profit and advantage to your orators and they were constantly receiving large orders for said cigars under said name or names.

And your orators further show that on the 19th day of February, A. D. 1876, they deposited in the office for the registration of patents, viz., the United States Patent Office, at Washington, in the District of Columbia, this name of "Normandi" as a trade-mark, and on the seventh day of March, 1876, received a certificate from said office that such trade-mark was there recorded, and that previous to such deposit they had used said name of "Normandi" generally with the prefix "La" before "Normandi" for a long space of time, to wit, during the entire period of time between the said date of the aforesaid assignment to them and the date of said deposit and registration, and that after such deposit and registration they continued to use the name as a trade-mark, and that they advertised the said cigars under the said name of "La Normandi" throughout the New England States, including the State of Maine, and thereby increased to a very great extent their sales of said cigars and their profits from said sales and the value of the words "La Normandi" as a trade-mark, and that they had the sole and exclusive right to use the said word as a trade-mark by virtue of the said assignment to them and of their said continued and uninterrupted application of said word, as herein set forth, and that they still continue to have and maintain said sole and exclusive right.

And your orators further show that the said cigars have always been manufactured by them with great care to sustain
4 the excellent reputation acquired in the beginning, and put up in bunches, tied with a peculiar colored and striped ribbon, and packed and offered for sale in boxes of peculiar shape, on which was branded the words "La Normandi" and a notice to the public of your orators' title to the said words "La Normandi" as a trade-mark.

And your orators further show that for a long space of time, to wit, from the first day of January, A. D. 1881, to the date of this bill of complaint, one Ernesto Ponce, defendant, of Portland, in the State of Maine, has been manufacturing and causing to be manu-

factured and offering for sale cigars substantially similar in shape, size, and all outward appearances to those manufactured by your orators and called "La Normandi" as aforesaid, and has put the said spurious and simulated cigars in boxes of the same pattern and general shape and size as those used by your orators, and in bunches substantially similar to the bunches of "La Normandi" cigars, and tied with ribbons colored and striped and generally resembling the ribbons used by your orators in tying the "La Normandi" cigars, and, having thus bunched, tied, and boxed the said spurious and simulated cigars in the style of bunching, tying, and boxing adopted by your orators for their "Normandi" cigars, has branded the said boxes containing the said cigars some of them "Normanda" and some of them "E. P. Normanda" and some of them "Normandie" and some of them "La Norma," so that the said cigars thus similar in shape, size, and all outward appearances to the "La Normandi" cigars manufactured by your orators and bunched in a similar manner and tied with ribbons like those used by your orators for their "La Normandi" cigars and placed in boxes of the same pattern and general shape and size as those used by your orators for their "Normandi" cigars and branded with a name similar in sound and appearance to the trade-mark "La Normandi," have appeared and were fraudulently intended by said defendant to appear to be the genuine "La Normandi" cigars manufactured by your orators, the more so as your orators have permitted the use of their agents' names and business address upon the genuine boxes of "La Normandi" cigars, supplied to said agents by your orators and sold by said agents; and that the said Ponce, intending fraudulently to mislead and deceive the public, has been wrongfully using certain other marks and devices on the said imitating and counterfeit boxes to increase the resemblance between his simulative and spurious cigars and the genuine "La Normandi" cigars manufactured by your orators, and thereby has deceitfully and fraudulently imposed upon the public and induced the public so imposed upon to purchase the said spurious and simulated cigars as the genuine "La Normandi" cigars of your orators; that he, the said Ponce, has been and is still selling and offering for sale said spurious and simulated cigars, thus prepared to deceive the public as the genuine "La Normandi" cigars of your orators, and has been holding them out to the public as genuine "La Normandi" cigars for the purpose of deceiving and defrauding the public, and has been advertising his said spurious and simulated cigars under the imitating names aforesaid in and throughout the several States of the United States, and particularly in the State of Maine, and by these means has succeeded in selling a very large number of his spurious and simulated cigars as the genuine "La Normandi" cigars manufactured by your orators, and that he still continues to advertise his said spurious and simulated cigars under the several imitating names of "E. P. Normanda," "Normanda," "Normandie," "La Norma," "Normans," sometimes using one of these names, sometimes another, all of said names being substantially like and almost identical with the said trade-mark of your orators throughout the several States, and particularly

in said State of Maine; that all the aforesaid imitating and similar names are calculated to represent that the said spurious and simulated cigars are the genuine "La Normandi" cigars of your orators, and that the said Ponce advertises his said spurious cigars
6 under the said imitating and similar names for the purpose of deceiving the public and defrauding your orators out of the gain and profits which they would otherwise have received.

And your orators further show that on the tenth day of April, A. D. 1882, your orators caused notice to be served upon the said Ponce that his advertisements and use of words substantially like their said trade-mark was an infringement of their trade-mark, and requested him to discontinue such use and advertisements at once, but that the said Ponce refused to so discontinue and continued and still continues to use and advertise his spurious and simulated cigars under the aforesaid imitating and similar words or names.

And your orators further charge that the public are, have been, and will be liable to be deceived by the defendant's fraudulent and wrongful use of said imitating and simulated words and names and of the aforesaid ribbons, boxes, marks, labels, and devices into believing that spurious and simulated cigars, so held out to them by the said Ponce as the genuine "La Normandi" cigars, are the genuine "La Normandi" cigars manufactured and sold by your orators.

And your orators further show that the fraudulent and inequitable acts and doings of the defendants have greatly injured your orators in the sale of their genuine "La Normandi" cigars in the profits which they would otherwise have reasonably made thereon, and in the reputation of their cigars, which has been greatly impaired by the substitution of an inferior imitation to the amount of at least two thousand dollars, and unless discontinued and prevented will work still further great and irreparable injury to your orators.

And your orators further show that the said defendant has manufactured and sold a large number of these spurious cigars having said simulated names, words, ribbons, boxes, and devices, but how large a number your orators are ignorant of, and pray that the said Ponce be required to disclose the same.

To the end, therefore, that your orators may obtain relief in
7 the premises in this honorable court, where alone adequate relief can be afforded, inasmuch as your orators are remediless at common law, they pray:

First. That the said Ernesto Ponce may be made a defendant to this bill and compelled to answer each and every allegation thereof on oath as fully and to the same extent as if he were directly and particularly interrogated as to each allegation.

Second. That he may be compelled to render in this court a full, true, and perfect account of all profits of every description which he has made or might have made by the use of the imitating and similar words and names aforesaid, in the manner described, and by the use of any other word or name, having as a constituent part thereof the word "Normandi," and by the use of any word, name, or simulated trade-mark so resembling the trade-mark "Normandi" as to deceive the public and calculated to so deceive that the public

would confound it with the trade-mark "La Normandi," and that he, the said Ernesto Ponce, be decreed to pay over to them, your orators, all such profits.

Third. That it may please this honorable court to have the loss and damage ascertained which has been inflicted upon your orators by reason of the defendant's wrongful infringement of their rights and the interference aforesaid with the right of exclusive use of the trade-mark "La Normandi," and that the said Ernesto Ponce be decreed to pay them, your orators, such damages.

Fourth. That the said Ernesto Ponce may be decreed to pay the costs of this suit and compensation for all damages done by him to your orators as aforesaid to the amount of at least two thousand dollars, and that your orators may have such other and further relief as the equity of this case may require and as to this honorable court may seem meet.

Fifth. And may it please this honorable court to grant unto your orators a temporary injunction against the said defendant,
8 enjoining and restraining him, his clerks, attorneys, agents, and servants, from using the aforesaid imitating words and names or any one of them or any word deceptively similar to the trade-mark "La Normandi," either in advertising or in branding the boxes containing his, the said Ponce's, spurious and simulated cigars or any other trade-mark or simulated trade-mark containing the word "Normandi," or substantially the same as the trade-mark of your orators, during the pendency of this suit.

Sixth. May it please this honorable court to grant unto your orators a final and perpetual injunction against the said defendant, restraining him from doing any of those wrongful and fraudulent acts mentioned in the prayer for a temporary injunction immediately preceding this, to the damage of your orators in their rights to their said trade-mark "Normandi."

Seventh. And that your orators may obtain the relief prayed for, and all such further or other relief as the nature of the case may require, may it please this honorable court to grant to your orators a writ of subpœna, directed to the said Ernesto Ponce, commanding him to appear and answer unto this bill of complaint, and to do and to receive what to this honorable court may seem meet in the premises.

MICHAEL STACHELBERG.
MOSES KIND.

CLARENCE HALE,
GODFREY MORSE,
Solicitors and of Counsel.

UNITED STATES OF AMERICA, *Southern District of New York:*

At the city of New York, in the county of New York and district aforesaid, this sixth day of December, in the year 1882, per-
9 sonally appeared before me, George W. Vultee, a notary public in and for the said city and county, the above-named M. Stachelberg and Moses Kind, and made oath that the facts set forth in the

foregoing bill, so far as they purport to be stated as of their own knowledge, are true, and so far as they purport to be stated on information and belief they believe — to be true.

Before me—

GEORGE W. VULTEE,
Notary Public (33), *C. & C. of N. Y.*

And on 1st day of May, A. D. 1884, is filed the following amendment to bill:

To the honorable judge of the circuit court of the United States for the district of Maine:

And now come the said complainants, by their counsel of record, Clarence Hale, and move this honorable court that they may be permitted to amend their bill in above-entitled suit in the following particulars:

That after the allegation of the assignment from Asher Bijur to Michael Stachelberg, one of your orators in this cause, there be inserted, following the date of said assignment, as set forth in said bill, to wit, the date "first day of February, A. D. 1865," the words "and granted, transferred, and conveyed to the said Stachelberg the good will of his business, and instructed the said Stachelberg in the proper manufacture of the said particular brand of cigar called 'La Normandi,' and by so doing and directing his customers to the said Stachelberg as his successor, and by supplying the said Stachelberg with the tobacco and with the labels and branding iron and other materials used before said assignment by said Bijur in his said business of manufacturing the said brand of cigar, constituted the said Stachelberg, as to said brand of cigars, his, the said Bijur's, successor in business."

Second. That wherever in the charging part of the said bill the words "La Norma" or "Normans" the same be stricken out, as upon examination of the testimony in the case the plaintiffs no longer desire to charge the use of those words as brands of cigars upon the defendant.

Third. That the following allegation may be inserted in the bill just before the commencement of the prayer in said bill, to wit, the words, "And your orators aver that the value to them of their said exclusive right to use the aforesaid trade-mark 'La Normandi' and 'Normandi' is very great, to wit, the value of fifty thousand dollars."

Fourth. That the words in the second allegation preceding the prayer in the bill and numbered from said prayer, to wit, the words "to the amount of at least two thousand dollars," be stricken out and the words "to the amount of at least ten thousand dollars" inserted in their place, so that said allegation may read as follows: "And your orators further say that the fraudulent and inequitable acts and doings of the defendant have greatly injured your orators in the sale of their genuine "La Normandi" cigars and in the profits which they would otherwise have reasonably made thereon and in the reputation of their cigars, which has been greatly im-

paired by the substitution of an inferior imitation, to the amount of at least ten thousand dollars, and unless discontinued and prevented will work still further great and irreparable injury to your orators."

Fifth. That the words "to the amount of at least two thousand dollars" be stricken out of the fourth prayer in said bill, and the words "to the amount of at least ten thousand dollars" be inserted in their place, so that said prayer may read as follows: "Fourth. That the said Ernesto Ponce may be decreed to pay the costs of this suit and compensation for all damages done by him to your orators as aforesaid to the amount of at least ten thousand dollars,
11 and that your orators may have such other and further relief as the equity of this case may require and as to this honorable court may seem meet."

M. STACHELBERG.
MOSES KIND.

UNITED STATES OF AMERICA.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, in said District:

On this 29th day of April, A. D. 1884, personally appeared Michael Stachelberg and Moses Kind and made oath that they have read the above amendment, and that the facts set forth in the same, so far as they are stated to be of their own knowledge, are true, and, so far as they are stated on information and belief, are true to the best of their knowledge, information, and belief.

Before me—

[L. S.] GEORGE W. VULTEE,
Notary Public (31), *C. & C. of N. Y.*

Upon the filing of said bill of complaint a subpœna in chancery issued to the respondent, returnable on the first Monday of February next ensuing; also a summons to show cause why a preliminary injunction should not issue against him as prayed for in said bill of complaint, both of which were returned duly executed. Said cause was entered in court, and the respondent having duly entered his appearance by his solicitors, Wm. Henry Clifford and M. P. Frank, Esquires, hearing was had on said petition for an injunction before Webb, J., and said injunction was denied, and on the 6th day
12 of February, A. D. 1883, was filed the following answer:

The answer of Ernesto Ponce, of Portland, in said district, to the bill of complaint of Michael Stachelberg and Moses Kind, of New York, in the southern district of New York.

To the honorable the justices of the circuit court of the United States within and for the first circuit and district of Maine:

This respondent, reserving unto himself all manner of exception and right of exceptions to the manifold errors and insufficiencies of the bill of complaint, for answer thereto alleges as follows:

This respondent denies all and all manner of allegation in said bill to the effect that in the manufacture of his cigars and the public vending of the same he has had any purpose or intention to deceive or mislead the public or to sell his cigars as and for those of the complainants, and he also denies that the sale by him of his "La Normanda" has, in fact, had the effect to lead the public into the belief that they were purchasing the brand of the complainants. This respondent alleges that he has sold cigars manufactured to his order under the brand or label of "La Normanda," but that these words have always been accompanied on the boxes or packages containing his article by the words E. P. or E. Ponce or Ernesto Ponce, and sometimes, also, by the further words, Portland, Maine, thus clearly denoting the person who was the manufacturer and the place thereof.

And this respondent denies that his said "La Normanda" cigars are spurious or simulated, or that the said label or designation which he has adopted copies or simulates the alleged trade-mark of the complainants; and this respondent alleges that his cigars sold under said designation are of excellent quality, of good material, and well manufactured, and that they have obtained a good reputation
13 in the market, and that he has been at expense in introducing, advertising, and making known his said article of cigars and by the said designation and name.

And this respondent denies that he has interfered with any trade in cigars of these complainants dependent upon the alleged trade-mark, but alleges that his manufacture of cigars, as he believes, has obtained its reputation by reason of the good quality of the same and from the fact that they were known to be of his manufacture.

As to the manufacture of cigars by Asher Bijur since 1858, and as to his entitling them or certain of them "La Normandi," this respondent leaves the complainants to make proof.

But he denies that the said Bijur ever had any exclusive right or that he could have such right to the words "La Normandi" as a trade-mark.

As to the alleged assignment from said Asher Bijur to Michael Stachelberg this respondent denies the same upon information and belief, and calls upon the complainants to establish the same by competent evidence, and he makes the same requirement concerning the firm of Stachelberg & Co. and as to their becoming joint owners of the alleged trade-mark.

And this respondent alleges that there is nothing by which to distinguish an article of cigars by putting 250 in a box or by making the said box of the shape of that of the complainants'.

And this respondent is informed and believes that in February, 1876, these complainants obtained the registration of a trade-mark in the Patent office of the United States, but he denies that the said trade-mark consisted alone of the word "Normandi" or the words "La Normandi," but that if any lawful trade-mark was thus covered by registration, that it was said words in combination with M. S. or Michael Stachelberg, or equivalent words denoting the manu-

facture of said cigar; and this respondent denies that he
14 has ever infringed or unlawfully used or appropriated any lawful trade-mark of the complainants embodying the words "La Normandi."

And this respondent alleges that the words "Normandi" and "Normanda" are of different significations, the former being the geographical and the latter a personal name, and that both are names in a foreign language.

And this respondent denies that the complainants have any exclusive right in the word "Normanda," but that the same has long been publicly used as a name or designation for cigars and has been stamped upon boxes and packages containing them long prior to any of the alleged rights of the complainants, and that the use of said word or term is of public right in connection with cigars and cannot be appropriated exclusively by any person; that the said term was in public use as a designating mark for a manufacture of cigars for many years at Havana, in the Island of Cuba, before any alleged rights of the complainants, if any, had accrued; that said cigars thus marked were sent to Europe and brought into this country, and that this was done in about the year 1861 and years following, and that this word was thus used by a man by the name of Martinez and Manuel Ponce and also respondent.

And this respondent further alleges that he himself has put up and sold cigars under the brand mark "Normanda" for many years, to wit, since the year 1861.

And this respondent denies, upon information and belief, that if the complainants have any right to the words "La Normandi," the use of the words "La Normanda" is any infringement of the same.

And this respondent denies, upon information and belief, that the complainants hold any lawful registration of the words "La Normandi."

This respondent alleges that he has never manufactured or ordered to be manufactured any cigars which he has sold under the names "La Norma," "La Normandie," or "La Normandi," but he has bought, in the course of trade, boxes of cigars marked
15 "La Norma," and "La Normandie" in the same manner as he has bought and sold other and common brands of cigars, but that he has never manufactured, bought, or sold any brand or mark of which the complainants possess the exclusive right.

And this respondent denies that there is anything which can be exclusively appropriated by the complainants in the shape or size of his cigars, or in the manner in which he bundles or ties them up, or that he, the respondent, has any intention of imitating, or does in fact imitate any trade-marks of the complainants by or in the manner in which he puts up his own cigars.

And this respondent, further answering, says that any other matter, cause, or thing in said bill of complaint contained material or necessary for this respondent to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is not true, to the knowledge or belief of this respondent; all of which matters and things this respondent is ready

and willing to aver, maintain, and prove as the honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

ERNESTO PONCE.

M. P. FRANK,
WILLIAM HENRY CLIFFORD,
Solicitors and of Counsel.

DISTRICT OF MAINE:

PORTLAND, *February* 6, 1883.

Then personally appeared the above-named Ernesto Ponce and says and makes oath that he is aware of the contents of this answer by him subscribed and the allegations thereof; that he understands them; that the same are true except those alleged upon information and belief, and as to those he believes them to be true.

Before me—

[L. S.]

A. H. DAVIS,
Clerk C. C. U. S., Maine District.

16 And on the 6th day of March, A. D. 1883, was filed the following replication:

To the honorable the justices of the circuit court of the United States within and for the first circuit and district of Maine:

The replication of Michael Stachelberg and Moses Kind, of New York, in the southern district of New York, complainants, to the answer of Ernesto Ponce, of Portland, in said district of Maine.

These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold errors and insufficiencies of the said answer, for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said respondent is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

MICHAEL STACHELBERG,
MOSES KIND,
By their Solicitor, CLARENCE HALE.

CLARENCE HALE,
Solicitor and of Counsel.

Said cause was continued from term to term to April term, A. D. 1884, when, by consent, publication passes as follows:

17 *Evidence for Complainants.*

NEW YORK, *May* 10, 1883—2 p. m.

Pursuant to notice and consent of counsel for the respective parties in the above-entitled matter.

Present: Edward Lauterbach, Esq., for plaintiffs; A. Herschfeld, Esq., for defendant.

(Adjourned to May 14, 1883, 1 p. m.)

NEW YORK, *May* 14, 1883—1 p. m.

Present: Counsel for the respective parties.

Deposition of Michael Stachelberg.

Direct examination by Mr. LAUTERBACH:

Int. 1. You are one of the complainants in this action?
Ans. Yes, sir.
2. You are a member of what firm?
Ans. Of the firm of M. Stachelberg & Company.
3. Composed of whom?
Ans. Michael Stachelberg and Moses Kind.
4. How long has that partnership been in existence?
Ans. For the last ten years.
5. What is your business?
Ans. My business is manufacturer of cigars.
6. That is the business of your firm?
Ans. That is the business of the firm.
7. When did you first become engaged individually in the business of manufacturing cigars?

18 Ans. Over twenty years ago.
8. That would be prior to 1863?
Ans. Yes, sir; prior to 1863.
9. Were you then manufacturing alone?
Ans. I was manufacturing alone; yes, sir.
10. Without a partner at that time?
Ans. Yes, sir.
11. Do you know Asher Bijur, of the city of New York?
Ans. Yes, sir; I knew him very well.
12. He is now deceased?
Ans. Yes, sir.
13. When did he die?
Ans. About three years ago.
14. When did you first become acquainted with him?
Ans. I got acquainted with him about 1863.
15. About the time that you began business?
Ans. Yes, sir.
16. What was his business?
Ans. His business was formerly that of manufacturer of cigars of a better grade of goods, and later on he was in the tobacco business.
17. Did he carry on both businesses at the same time?

Ans. No, sir. When he was manufacturing cigars he was a manufacturer solely.

18. Did you know him while he was a manufacturer of cigars?

Ans. I knew of him and knew him personally, but was not very intimate with him when he was manufacturing cigars.

19. When did he cease the manufacturing business?

Ans. About 1863 or 1864.

20. Were you familiar with the brands of cigars that he turned out, or with any of his cigars?

Ans. I knew of most of his brands that he made.

21. Among other brands did he manufacture a brand known as "La Normandi?"

19 Ans. He manufactured that brand very largely.

22. When did you first know of his manufacturing those cigars?

Ans. About 1863 or 1864—along about that time.

23. Have you ever manufactured that brand?

Ans. I have manufactured it later.

24. When did you begin to manufacture it?

Ans. About the end of 1865 or the commencement of 1866.

25. Can you recall the manner in which the cigars were put up and their appearance generally during the time that Mr. Bijur manufactured them?

Ans. He put them up 250 in a box, twenty-five in a bundle, and he branded them "La Normandi."

26. So that there were ten bundles in each box?

Ans. Yes, sir.

27. And they were labelled "La Normandi?"

Ans. Yes, sir.

28. How was the box branded?

Ans. The cigar box was branded "A. Bijur."

29. And on the label appeared the name "La Normandi?"

Ans. Yes, sir; and signed "A. Bijur" at the bottom of it.

30. Do you know anything as to the manner in which they were tied together? Was there any special thing in regard to that?

Ans. They were tied together with a dark yellow ribbon, two stripes, and tied twenty-five in a bundle, with a yellow and red striped ribbon.

31. Of what material?

Ans. Plain cotton material.

32. Did you know of any other cigars that were tied with the same ribbon in the market at that time?

Ans. There were some, but not the same stripe of yellow.

33. What was the peculiarity of the stripe?

Ans. It was a narrower stripe intermingled with blue and green.

20 34. That was the Bijur cigar.

Ans. That was only red and yellow.

35. Did you know of any other cigar at that time that was bound together like the Bijur cigar?

Ans. No, sir.

36. Did any other brands of the Bijur manufacture have the same ribbon?

Ans. No, sir.

37. When Mr. Bijur abandoned the cigar manufacturing business and began the sale of leaf tobacco did you become a customer of his?

Ans. I did most of my buying of tobacco from him, and I became very intimate with him, and he used to come four or five times a week and spend a few hours with me, and he told me that if I would go on and make the cigars satisfactorily——

(Mr. HERSCHFELD: I object to the testimony as being hearsay.)

38. He came to your place frequently, and what, if anything, was done by him in respect to the "La Normandi" brand of cigars?

Ans. He transferred it to me and said if I would go on and make those goods properly he would send me customers that would buy them.

39. Was anything put in writing in respect to it?

Ans. Yes, sir.

40. Have you looked for that writing?

Ans. Yes, sir; and I cannot find it.

41. When did you last see it?

Ans. Years ago. I cannot remember.

42. How many years ago was it that you last saw it?

Ans. About fifteen years ago.

43. That would be about 1868. Was it not prior to that time?

Ans. It was about that time. I cannot say exactly.

21 44. How long after Mr. Bijur discontinued manufacturing these cigars was it?

Ans. A year or two after he stopped manufacturing.

45. Where did you put it when you saw it last?

Ans. I really cannot remember that. I put it among my own papers, as I did not consider it of any consequence.

46. And you have not been able to find it?

Ans. No, sir.

47. What were the contents of the paper?

Ans. It was an assignment of the right of using that brand to me.

48. By whom?

Ans. By A. Bijur to M. Stachelberg.

49. Did Mr. Bijur know of your manufacturing these cigars during that period?

Ans. He has been very frequently in my place and seen them, and he told me to manufacture them.

50. And you say that he sent you customers for the cigars?

Ans. Yes, sir.

51. People who traded with him before that?

Ans. Yes, sir.

52. And he frequently came into your office?

Ans. Yes, sir; he came in four or five times every week and stayed there for hours.

53. When you began manufacturing these cigars how soon after

the assignment was made to you did you begin to manufacture the cigars?

Ans. At once.

54. And can you give me the date when it was that you first began to manufacture—as nearly as you can?

Ans. I believe it was in January, 1866.

55. Did you have a label made?

Ans. I had a label made changing the name of "A. Bijur" to "M. Stachelberg."

56. (Witness shown a label.) Was that label similar to the
22 one which was made when you first began to manufacture the cigars?

Ans. It is the same.

57. And to whom did you give the directions to make that label?

Ans. To Mr. Heppenheimer.

(Mr. LAUTERBACH: I offer the label referred to in evidence. It is marked "Exhibit A, May 14, 1883, E. C. K.")

58. And you had it entered "according to act of Congress," as it appears on the label?

Ans. Yes, sir; just about the time that we got it up.

59. Will you state in what respect that label differed from the label which Mr. Bijur had?

Ans. The only difference was in the change of the name, "M. Stachelberg" instead of "A. Bijur," and the initials "M. S." instead of "A. B."

60. So that instead of the initials "A. B." your initials appeared, and instead of "A. Bijur" "M. Stachelberg" appeared at the bottom of the label, and the words "La Normandi" appeared on both labels?

Ans. Yes, sir.

61. Do you know whether there was any difference in the coloring?

Ans. No, sir; it was the same coloring.

62. Do you know who had made Mr. Bijur labels at that time?

Ans. I believe Mr. Heppenheimer—the same manufacturer.

63. Did he receive any direction, to your knowledge, from Mr. Bijur in respect to manufacturing those labels for you?

(Objected to.)

(Answer taken subject to the objection.)

Ans. No label-maker will make a brand or label unless he receives an order from the original owner.

64. And Mr. Bijur gave you such an order as that?

Ans. Yes, sir.

65. And you delivered it to Mr. Heppenheimer?
23 Ans. Yes, sir.

66. That order directed him to make the label for you?

Ans. Yes, sir; with the changes that I should suggest.

67. Who made your boxes when you first began making this brand?

Ans. George Wicke & Company.

68. Mr. William Wicker, now present, was a member of that firm?

Ans. Yes, sir; I believe he was a member of that firm.

69. In what way were the boxes made that Mr. Bijur had used? Can you describe them?

Ans. They were made of plain cedar wood of the proper size for the cigars, and branded, as I have described, with "A. Bijur "on the top of it—" La Normandi " and "A. Bijur."

70. Was that branded in the box?

Ans. Yes, sir.

71. And the firm of George Wicke & Company made your boxes? What difference was there in those boxes?

Ans. Our boxes were branded " La Normandi," with the initials " M. S."

72. In all other respects they were the same with the exception of the initials?

Ans. He had two names on the brand—"A. Bijur "—and I had only the initials " M. S."

73. But in all other respects the boxes were the same?

Ans. Yes, sir.

74. Did you receive any order on Mr. Wicke to make the boxes for you?

Ans. He gave me an order to his box-makers and I presented it to Mr. Wicke's firm.

75. In what way did you do them up?

Ans. I put the bundles in the same shape as the " La Normadnis " were originally put up, with the same ribbon, in the same boxes, with the difference only of the name and the difference of the name on the label.

24 76. By the difference of the name you mean that instead of the name of A. Bijur appearing on the box your name was branded upon it, together with " La Normandi."

Ans. Yes, sir.

77. And the label differed in the way you have described?

Ans. Yes, sir.

78. In other respects they were the same?

Ans. Yes, sir.

79. Where did you procure this ribbon at this time?

Ans. We had the same ribbon imported from Europe and afterwards we had it made here.

80. Who directed you as to where to procure the ribbon?

Ans. Mr. Bijur directed me.

81. Do you know where it was that you procured it?

Ans. I do not know now. I do not remember it.

82. How often was Mr. Bijur at your place during January, 1866?

Ans. He was there almost every day.

83. Do you know whether he knew of your manufacturing this brand?

Ans. I only commenced manufacturing it at his suggestion.

84. State how you know that he knew that you were manufacturing it.

Ans. He was in the factory two or three hours every day and he saw the cigars put up. We put them up in his presence; he saw them; he examined them; he smoked them, and he brought us customers for them.

85. Of what material were the "La Normandi" cigars made while Mr. Bijur manufactured them?

Ans. They were made of Havana fillings and Connecticut wrappers and binders.

85½. They are known ordinarily as seed and Havana cigars?

Ans. Yes, sir.

86. What can you say of their character of manufacture?

25 Ans. They are a very good cigar—known as one of the best cigars that are made here for the New England States.

87. Was Mr. Bijur's trade in the New England States for that brand?

Ans. For that brand of cigars it was mostly in the New England States.

88. And how did you continue to manufacture them as to the material used?

Ans. I manufactured them from the same materials as Mr. Bijur used and under his advice, and all who tried the cigars and all who tried the tobacco declared it to be the same material as Mr. Bijur used. I let him try the cigars himself, and I also let him try the tobacco before I purchased it.

89. And you continued to make them as Havana fillings?

Ans. Yes, sir.

90. How did they compare with those that Mr. Bijur manufactured as to quality?

Ans. Very favorably. The customers took them for the same class of goods.

91. So that, so far as you knew, they were equally as good?

Ans. Yes, sir.

92. And from that time down to the present time you have continued to manufacture that brand of cigars?

Ans. Yes, sir.

93. You continued in the business alone until you formed a copartnership with Mr. Kind?

Ans. I remained alone until 1873, and then I went into partnership with Mr. Kind, and have continued as a firm until this time.

94. And in forming your copartnership your old assets that you had individually were put into the new copartnership?

Ans. Yes, sir.

95. Including any right that you had for the manufacture of this brand of cigars?

26 Ans. Yes, sir.

96. Did you do anything in respect to this brand or trade-mark subsequent to the time that you first began to manufacture it, except to have it copyrighted, as appears on the label?

Ans. Yes, sir; we had it patented as a trade-mark.

97. Under the then existing law?
Ans. Yes, sir.
98. In what year was that?
Ans. That was in 1876.
99. Who applied for that trade-mark?
Ans. The firm of M. Stachelberg & Company.
100. Did Mr. Bijur know of your application?
Ans. Yes, sir.
101. He subscribed the application as a witness, did he not?
Ans. Yes, sir.
102. Will you state approximately what the extent of your business has been in respect to the "La Normandi" cigar since you manufactured it?
Ans. I am not posted on the figures. My partner can give you that better than I.
103. Give us about the figures.
Ans. We have been selling of that brand of cigars lately about 2,000,000 a year.
104. And when you first began selling them—have you any idea how much you sold when you first began selling them?
Ans. We commenced at about 200,000 cigars, and went on every year more and more until last year it was over 2,000,000 cigars.
105. And where was your trade for them, chiefly?
Ans. Mostly in the New England States.
106. Inclusive of the State of Maine?
Ans. Yes, sir.
107. Had you agencies in the New England States?
27 Ans. We had an agent formerly by the name of Nelson, and later on we have had Estabrook & Eaton.
108. Had you travelers to sell the cigars?
Ans. No, sir; we had no travelers.
109. Your agents developed the business in those States?
Ans. Yes, sir.
110. Have you sold the cigars to other districts besides the New England district?
Ans. We have, but not in the same packages.
111. They were packed especially for the New England States?
Ans. Yes, sir.
112. Has any change taken place during the time of the manufacture of those cigars by you in the manner of putting them up?
Ans. There has been a change lately.
113. In what respect?
Ans. The ribbon has been changed. Instead of the plain ribbon we have had a ribbon manufactured of part silk with the name "La Normandi" woven into the ribbon.
114. Before that had you made a change from the original ribbon?
Ans. Yes, sir; we sometimes had the words "La Normandi" printed on it.
115. And subsequently you had it woven in?
Ans. Yes, sir.

116. For what purpose was that done?

Ans. To guard against imitations and to caution people against the imitations.

117. When did you first make a change of the ribbon to the printed ribbon, "La Normandi." About how long ago was that done?

Ans. About five years ago.

118. And when did you change it to the woven ribbon?

Ans. That is only about two years ago, or rather last year.

28 119. At the time Mr. Bijur manufactured these cigars did you know of anybody else who manufactured them?

Ans. None of that brand. No one manufactured them, to my knowledge, besides Mr. Bijur.

120. Had you ever heard, or seen, or known of any one manufacturing that brand of cigars?

Ans. Not to my knowledge. I have seen "Normas," but not "La Normandi;" and I have seen "L Norgiega."

121. That was the first you knew of a "La Normandi" brand, when you knew of Mr. Bijur's brand?

A. Yes, sir.

122. Had you ever heard of any imported cigars bearing the name of "La Normandi?"

Ans. No, sir.

123. To what extent was your familiarity in 1863 with the business when you first knew of Mr. Bijur's cigars?

Ans. I was not an extensive manufacturer nor was my knowledge very extensive, but I never heard of the "La Normandi" cigar. I had heard of "La Norma" and "L Norgiega."

124. Those were imported brands?

Ans. Yes, sir.

125. And those were the nearest brands of cigars to the "La Normandi" in sound?

Ans. Yes, sir.

126. When did you first know of any one else manufacturing these cigars other than yourself or Mr. Bijur?

(Objected to.)

(Question withdrawn.)

127. Did you know of any such cigars being made by anybody else? Did you ever see any?

Ans. I never saw the "La Normandi" cigar made by anybody else.

128. You only know of it by hearsay?

Ans. Yes, sir.

29 129. You still continue to manufacture that brand largely?

Ans. Yes, sir.

130. How does the material used at the present time and that used for the past few years for the manufacture of this cigar compare with what you formerly used?

Ans. We use the same class of materials. Perhaps it is not always alike, but we try to have it alike.

131. And the manner of making the cigar is just the same?
Ans. Yes, sir.
132. Has the cigar a reputation among the trade?
Ans. It has as good a reputation as any domestic cigar that goes to the New England States.
133. I don't want to know what you heard about others manufacturing these brands, but I desire to ask you when it was when you first heard that anybody was manufacturing the "La Normandi" or "La Normanda," or any other similar cigar.
Ans. We heard it six or seven years ago.
134. What did you do?
Ans. We always gave them notice that we held the brand and that it was our own right, and they stopped manufacturing.
135. The copyright which is on file in Portland, issued to M. Stachelberg, refers to you?
Ans. Yes, sir.
136. And the trade-mark patent to M. Stachelberg & Company is to your firm of M. Stachelberg & Company?
Ans. Yes, sir.
137. You have not seen any of the imitation cigars, have you?
Ans. No, sir.
138. You cannot, then, describe the difference between them?
Ans. No, sir.

30 Cross-examination by Mr. HERSHFIELD:

X 139. When was this assignment that you have spoken of made?
Ans. About the end of 1865 or the commencement of 1866.
X 140. Is that as definitely as you can come to it?
Ans. Yes, sir.
X 141. Was it in writing?
Ans. It was in writing.
X 142. Do you know where it was drawn?
Ans. I cannot remember.
X 142½. Or by whom it was drawn?
Ans. I cannot remember.
X 143. Was it drawn in this city?
Ans. Yes, sir.
X 144. Who delivered it to you?
Ans. Mr. Bijur.
X 145. Do you recall that fact that he delivered it to you?
Ans. Yes, sir.
X 146. Was it acknowledged before an officer?
Ans. I believe it was.
X 147. Was it signed by him?
Ans. It was signed by him.
X 148. How long did you retain that paper?
Ans. I do not know where I have got it. I had it in my possession all the time. I have looked for it, but have not been able to find it.
X 149. Where did you look for it?

Ans. Among my old papers, and I could not find it.
X 150. When did you last look for it?
Ans. When I wanted it.
X 151. When was that?
Ans. Lately.
X 152. How lately?
Ans. About a year or six months ago.
31 X 153. Have you looked for that paper within six months?
Ans. I have.
X 154. Where did you look for it?
Ans. Among all my old papers—wherever I thought I could find it.
X 154½. Where did you keep your old papers?
Ans. We kept them around the office.
X 155. Have you been in the same place of business ever since you got this paper?
Ans. No, sir.
X 156. How many times have you moved?
Ans. At least five or six times.
X 157. And have you preserved your old papers?
Ans. Some I did.
X 158. Have you preserved papers as old as this assignment?
Ans. No, sir.
X 159. You have not preserved any of those papers?
Ans. No, sir.
X 160. And you do not know where this paper now is?
Ans. No, sir.
X 161. You have not destroyed it?
Ans. No, sir; I do not remember where I put it.
X 162. You put it somewhere and you do not remember where it is?
Ans. No, sir.
X 163. You stated on your direct examination that Mr. Bijur stated to you that you should go on and make these cigars?
Ans. Yes, sir.
X 164. What did he say that to you for?
Ans. Because there was a trade in the New England States that he held, and as he stopped manufacturing he said, "If you will go on and make those cigars properly I will bring you the customers."
32 X 165. How long before the assignment was that?
Ans. A few months before.
X 166. And in this assignment how was this brand described?
Ans. It was described as "La Normandi."
X 167. How do you spell the termination of "La Normandi"—da or di?
Ans. "La Normandi."
X 168. That was the brand as it was transferred to you in that assignment?
Ans. Yes, sir.
X 169. And those are the words that you rely upon as the trademark in this case?

Ans. Yes, sir.

X 170. Are those all the words that you rely upon as the trade-mark in this case?

Ans. I rely upon the initials and name also.

X 171. State all that you rely upon.

Ans. "M. Stachelberg" and the initials "M. S."

X 172. State all the words that you rely upon as the trade-mark in this case. State the whole trade-mark.

(Objected to on the ground that the witness is entitled to claim all the law gives him in respect to his rights of trade-mark.)

(Answer taken subject to the objection.)

Ans. "The picture," "La Normandi," "Normandi," the name "M. Stachelberg," and the initials "M. S."

X 173. Is that all?

Ans. That is all except the way the goods are packed.

X 174. That is all, is it not?

Ans. Yes, sir.

X 175. Do you claim the trade-mark to be "La Normandi" and "Normandi" and the name "M. Stachelberg" and the initials "M. S.?"

Ans. All those things combined constitute the brand.

X 176. Which is your trade-mark? is my question.

33 Ans. "La Normandi" and "Normandi."

X 177. Both?

(Objected to on the ground that the law fixes what trade-mark consists of.)

(Answer taken subject to the objection.)

Ans. The name of "Normandi" and "La Normandi" is the trade-mark. I do not understand your question.

X 178. Which do I understand you to claim as being the name of your trade-mark—"La Normandi" or "Normandi?"

Ans. I claim both.

X 179. Do I understand that your trade-mark has the use of the words "Normandi" or "La Normandi" with the combination of "M. Stachelberg" or without?

Ans. I claim the name of M. Stachelberg, the initials "M. S.," the words "La Normandi," and "Normandi."

X 180. With the combination of your initials or without?

Ans. I claim it without my initials.

X 181. And also then without your name?

Ans. Yes, sir; and also without the name.

X 182. Then your claim is that your trade-mark consists of the words "La Normandi" or the single word "Normandi," as you elect to use it?

Ans. Yes, sir.

X 183. Then, in addition, the words "M. Stachelberg" or the initials "M. S." are used in connection with the words "La Normandi" or the single word "Normandi" in order to indicate your ownership simply; is that it?

Ans. Yes, sir.

X 184. And you used the words "La Normandi" or "Normandi" as you see fit, either with or without the use of the name or the initials, do you not?

Ans. Yes, sir.

X 185. You have put up cigars without the words "M. Stachelberg" and the initials "M. S," have you not?

Ans. Not of that brand.

X 186. Are you certain of that?

34 Ans. Yes, sir.

X 187. Have not you packed cigars and branded them "La Normandi" or "Normandi" without either the use of your name or your initials?

Ans. Never.

X 188. What language are these words "La Normandi" or "Normandi" taken from; do you know?

Ans. "La" is French or Spanish; it is either taken from the Spanish or the French language.

X 189. And have you not seen the word "Normandi" used upon foreign cigars long before you ever got this right from Mr. Bijur?

Ans. Never.

X 190. You never saw the word "Normandi" used on imported cigars?

Ans. Never; I have seen "La Norma."

X 191. Do you know the firm of Yeaman Brothers, of Boston?

Ans. No, sir.

X 192. Have you seen any of their manufacture?

Ans. No, sir.

X 193. You do not know whether they have used the words "La Normandi" as a brand for the last twenty-five years or not?

Ans. No, sir; I don't know anything about it.

X 194. You have never heard of it?

Ans. No, sir.

X 195. At the time of your entering into copartnership with Mr. Kind was there any written agreement of copartnership between you?

Ans. Yes, sir.

X 196. Have you that agreement with you?

Ans. No, sir.

X 197. Did it particularly specify, as part of your invest-

35 ment, that you invested the use of these words that you testified to as a trade-mark?

Ans. No, sir.

X 198. Was there anything mentioned about that in your written articles of copartnership?

Ans. No, sir.

X 199. Did your written articles of copartnership specify the contributions made by each partner to the capital of the firm?

Ans. I don't know what you mean.

X 200. Don't you know that the written articles of copartner-

ship specified the contributions by each of the partners to the capital of the firm?

Ans. Yes, sir.

X 201. The assets which each one of you contributed were mentioned in the articles of copartnership, were they not?

(Objected to on the ground that the question calls for secondary evidence.)

(Answer taken subject to the objection.)

Ans. I do not remember.

X 202. Do your articles of copartnership between you and your codefendant, Mr. Kind, specify what each man invested in the business then being formed?

Ans. I do not remember what was specified.

X 203. Will you testify that they do not specify the investment made by each copartner to the capital of the firm then being formed?

Ans. I do not think it was specified.

X 204. It did not state how much each man put in?

Ans. I do not remember what specifications were made in the articles. I don't know what we had put in, except the division of the profits.

X 205. That agreement was drawn when you originally entered into copartnership with Mr. Kind?

Ans. Yes, sir.

36 X 206. And that was about ten years ago?

Ans. Yes, sir.

X 207. And it has never been changed?

Ans. We never made any other written agreement.

X 208. You simply renewed the old agreement verbally?

Ans. We changed it somewhat later on.

X 209. In what respect?

Ans. His share becoming larger in the profits.

X 210. In other respects it was unchanged?

Ans. In other respects it was unchanged.

X 211. Is that agreement in existence?

Ans. I don't know, really.

X 212. Did you have a copy of it?

Ans. I had a copy.

X 213. And Mr. Kind, your copartner, had a copy?

Ans. Yes, sir.

X 214. What words did Mr. Bijur use on his brand of cigars?

Ans. "La Normandi."

X 215. Is that all?

Ans. "A. Bijur."

X 216. With his name added?

Ans. Yes, sir.

X 217. Is that all?

Ans. And the initials.

X 218. With initials instead of his name?

Ans. He used both.

X 219. The words used in Exhibit A are "La Normandi?"

Ans. Yes, sir.

X 220. And the use of those words were what he transferred to you by the assignment previously referred to?

Ans. Yes, sir.

X 221. He did not transfer to you the use of the single word "Normandi," or anything else except the words "La Normandi;" is that so?

37 (Objected to as incompetent and immaterial.)
(Answer taken subject to the objection.)

Ans. I could not say whether it was "La Normandi" and "Normandi" or both. I know he transferred to us his right to manufacture that cigar.

X 222. You use upon this label the words that you understood to be the words transferred to you by that assignment?

Ans. Yes, sir.

X 223. And those words are "La Normandi?"

Ans. Yes, sir.

X 224. Will you testify that the use of any other word or words was transferred to you by the assignment?

Ans. No, sir; I could not.

X 225. Do you know whether Mr. Bijur had these words copyrighted or registered?

Ans. I don't know.

X 226. You never heard that he did?

Ans. I heard so—that he did.

X 227. Do you swear to that?

Ans. Yes, sir.

X 228. Was there any mention made of that in the assignment?

Ans. I think it was.

X 229. Have you any recollection on the subject at all?

Ans. I think a paper of that kind had been registered; he could not assign a copyright to me unless he had a copyright.

X 230. Then you base your answer upon the fact that you supposed him to have it copyrighted in order that he might transfer it to you?

Ans. Yes, sir.

X 231. And you have no recollection of the contents of that paper or anything else on that subject?

Ans. No, sir.

X 232. Do you use this label, Exhibit A, of this date, upon your cigars now?

38 Ans. Yes, sir.

X 233. Invariably?

Ans. Yes, sir.

Redirect examination:

234. In point of fact, Mr. Stachelberg, from the time that you went into business with Mr. Kind to the present time the cigars manufactured under the brand of "La Normandi" have been sold for and

on account of the firm of M. Stachelberg & Company, have they not?

Ans. Yes, sir.

235. You have not used the brand individually in any way?

(Objected to as incompetent.)
(Answer taken subject to the old objection.)

Ans. No, sir.

236. And all the business you have done in respect to the brand has been done on partnership account?

(Objected to as immaterial and incompetent.)
(Answer taken subject to the objection.)

Ans. Yes, sir.

237. The original copartnership was formed about ten years ago?

Ans. Yes, sir; in 1873.

238. And it was to continue for two years?

Ans. Yes, sir.

239. And after it expired you made some new arrangement with Mr. Kind?

Ans. Yes, sir.

240. And from that time down to the present the trade-mark has belonged to whom?

(Objected to as immaterial and incompetent.)
(Question withdrawn.)

241. What did you do with the trade-mark from the time
39 that you first formed the copartnership down to the present time; what disposition did you make of it?

Ans. It was used by the firm.

242. It was one of the assets of your individual business?

Ans. Yes, sir.

243. It formed a part of your assets contributed to the firm at the time of the formation of the firm of which you are a member now?

(Objected to.)
(Answer taken subject to the objection.)

Ans. Yes, sir.

244. And to whom has it since belonged?

(Objected to.)
(Answer taken subject to the objection.)

Ans. To the firm.

245. In respect to your claim for the trade-mark I take it for granted that you claim of the trade-mark whatever the law will give you?

(Objected to.)
(Answer taken subject to the objection.)

Ans. Yes, sir.

MICHAEL STACHELBERG.

Subscribed and sworn to before me the 14th day of May, A. D. 1883.

JOHN A. OSBORN,
U. S. Commissioner, S. D. N. Y.

40 *Deposition of William Wicke.*

Direct examination by Mr. LAUTERBACH:

Int. 1. What is your occupation?
Ans. Manufacturer of cigar boxes.
2. How long have you been in business?
Ans. Twenty-eight years.
3. That would be since 1858?
Ans. Yes, sir; since 1855.
4. By whom was the business conducted in 1855?
Ans. By my brother, George Wicke.
5. You were in his employ at that time?
Ans. I was.
6. Did you become a partner of his?
Ans. Yes, sir.
7. About what time?
Ans. In 1863.
8. Were you familiar with his business in the meantime?
Ans. Yes, sir.
9. Then you remained in copartnership with him down to the time of his death?
Ans. Yes, sir.
10. When did he die?
Ans. In 1875.
11. And you are now a member of the firm of William Wicke & Co.?
Ans. Yes, sir.
12. Consisting of yourself and whom?
Ans. Of myself and Augustus Roesler.
13. Do you remember making any cigar boxes for Mr. A. Bijur, or manufacturing cigar boxes bearing the brand of "La Normandi?"
Ans. Yes, sir.

41 14. What is your first recollection of doing that—when did you first do it?

Ans. It was in 1856; in the latter part of 1856 or the beginning of 1857.

15. Will you state what was the character of the box and its peculiarity, if any?

(Mr. HERSHFIELD: I object to the witness' whole testimony from the beginning to the end as immaterial, irrelevant, and incompetent.)

(Answers taken subject to the objection.)

Ans. It was a large-sized box intended for 250 cigars.
16. And branded in what way?
Ans. I used to call them quarters.

17. Meaning quarters of a thousand?
Ans. Yes, sir.
18. And it was branded how?
Ans. With the words "La Normandi" and the name "A. Bijur."
19. In what manner were these cigar boxes branded—with what sort of a brand?
Ans. It was done at that time with a hot iron.
20. Containing the name reversed; and then when it was applied to the box the name was burned in?
Ans. Yes, sir.
21. Did you ever make the same brand for more than one person at a time?
Ans. We changed the brand afterwards for Mr. Stachelberg.
22. In your business did you ever use the same brand for more than one person?

(Objected to.)

Ans. For nobody else but Mr. A. Bijur.
23. Until Mr. Stachelberg became the owner?
Ans. Until it was assigned to Mr. Stachelberg or Mr. Stachelberg became the owner of it and had a right to use the name.
42 24. In whose possession was that branding iron?
Ans. In our possession.
25. And for whose boxes was it used?
Ans. For Mr. A. Bijur's.
26. Only for his use?
Ans. Yes, sir; and on his orders.
27. Do you remember about the time when Mr. Bijur abandoned the business and gave up the manufacture of cigars?
Ans. Yes, sir; it was about the year 1863 or 1864.
28. And for whom did you make those boxes afterwards?
Ans. We made those "La Normandi" boxes for Mr. Stachelberg.
29. And you used the same iron?
Ans. No, sir; we did not; the brand was changed.
30. In what way was it changed?
Ans. Instead of the name "A. Bijur" we put the initials of "M. S." I have a copy of the brand with me.

(Witness produces a paper.)

31. In all other respects it was the same?
Ans. Yes, sir.
32. This paper which you have produced is an exact counterpart of the brand?
Ans. Yes, sir.
33. This is a copy taken from the branding iron?
Ans. It was changed somewhat; I have no copy of the branding iron.
34. Have you, perhaps, a copy of the branding stamp that Mr. Bijur used?
Ans. No, sir; we have changed the branding. We destroyed all these iron brands.

35. What do you do instead of branding?

Ans. Since about 1865 or 1866 we commenced printing instead of branding.

36. And after 1866, instead of branding these boxes "La Normandi," "M. S.," you printed them?

43 Ans. Yes, sir.

37. And when did you begin to print the words "registered trade-mark" at the foot of this paper; do you know when that was done?

(Objected to.)

Ans. Some years after.

38. Can you remember the year?

Ans. In the year 1870.

(Said last-mentioned paper is offered in evidence and marked "Exhibit B, May 14, 1883, E. C. K.")

39. Is this a copy of the printed name affixed to the boxes since the branding was discontinued?

Ans. Yes, sir.

40. Prior to 1876 the words "registered trade-mark No. 3496" did not appear upon the brand at that time?

Ans. I don't know whether it was exactly in that year, but it was not on from the beginning.

41. And subsequently, at some time after the beginning, the words "registered trade-mark No. 3496" were added?

Ans. Yes, sir.

42. And before that the brand was exactly the same, with the exception of those words "registered trade-mark No. 3496" being omitted?

Ans. Yes, sir.

43. The burning brands that were used prior to the printed stamps—how did they compare with the printed stamps?

Ans. Mr. Stachelberg never had a burning brand.

44. Before you took Mr. Stachelberg's order did he exhibit any writing to you from Mr. Bijur?

Ans. I do not remember exactly, but it is the case always with us never to give a brand to anybody but the owner.

45. You cannot remember this specific case?

Ans. No, sir.

46. Have you looked for such paper writing?

44 Ans. We do not keep them. We keep them perhaps a year and then all these papers are destroyed.

47. So that if it were given you would not have it any more?

Ans. No, sir.

48. Did you ever print this brand for any one except Mr. Stachelberg?

Ans. For nobody else than Mr. Stachelberg and Mr. Bijur.

49. And how many boxes did you make for them a year?

Ans. We kept no record of it. We make a good many other brands besides for Mr. Stachelberg. We may have made altogether

40,000 to 50,000 boxes of this special brand since we worked for him.

50. You say you used the branding iron for Mr. Bijur and you printed these labels for Mr. Stachelberg?

Ans. Yes, sir.

51. Had you also printed labels for Mr. Bijur?

Ans. No, sir.

Cross-examination by Mr. HERSHFIELD:

X 52. When you worked for Mr. Bijur how did you print this brand for him?

Ans. I branded it with a hot iron on the box.

X 53. What words were on it, or how did it differ from Exhibit B?

Ans. The difference was in the initials. In place of the initials it had the words "A. Bijur," and, of course, without this monogram. In all other respects it was alike.

X 54. Then, do I understand you to say that the entire brand and all the words that appeared upon it when you worked for Mr. Bijur were the words "La Normandi, A. Bijur?"

Ans. That is all that appeared on the brand.

45 X 55. And was that the uniform way in which you printed that brand for Mr. Bijur during the entire time that you worked for him?

Ans. Yes, sir.

X 56. That was the only one style in which you printed that brand?

Ans. There was no other.

X 57. Simply the words "La Normandi" with "A. Bijur?"

Ans. Yes, sir.

X 58. There were no other words upon it?

Ans. No, sir.

X 59. No words indicating copyright, registry, or anything of that kind?

Ans. No, sir.

X 60. Nor did you print any other label of that brand with any other words upon it for Mr. Bijur?

Ans. We are not label printers.

X 61. Whatever you are?

Ans. We are branders. That was the only brand that we had for Mr. Bijur—"La Normandi, A. Bijur"—for one-sized boxes.

X 62. That is the only style you branded for him?

Ans. That was the only style for this brand of cigars.

X 63. Did you print or brand any of them with the single word "Normandi" or "Normanda," without the "La?"

Ans. Never.

X 64. How long did you make boxes for Mr. Bijur?

Ans. Since I came with my brother in 1855, and he was a customer of my brother's when I came with him.

X 65. After you commenced making boxes for Mr. Stachelberg

when did you first commence making brands without the word "La?"

Ans. I never made any that I remember. I always made them "La Normandi."

X 66. The same as you made for Mr. Bijur?

46 Ans. Yes, sir.

X 67. Did you make all of Mr. Stachelberg's boxes?

Ans. I suppose I did; yes, sir.

X 68. In printing this brand for Mr. Stachelberg did you use the words "La Normandi, M. Stachelberg" or "La Normandi, M. S.?"

Ans. Only with the initials, as it appears on this print.

X 69. And you never printed any with his name in full?

Ans. No, sir.

X 70. The only style that you ever printed on the box for him contained the words "La Normandi, M. S.?"

Ans. Yes, sir.

By Mr. LAUTERBACH:

71. Can you tell me when Mr. Stachelberg gave you his first order for the boxes?

Ans. Yes, sir; it was on the 29th of January, 1866—that is, of this special brand.

72. You gave that date from your order book?

Ans. Yes, sir.

WILLIAM WICKE.

Subscribed and sworn to before me this 14th day of May, 1883.

JOHN A. OSBORN,
U. S. Commissioner, S. D. N. Y.

47 *Deposition of Isaac Bijur.*

Direct examination by Mr. LAUTERBACH:

Int. 1. What is your occupation?

Ans. Dealer in tobacco.

2. Leaf tobacco?

Ans. Yes, sir.

3. You are the brother of Asher Bijur, who has been spoken of by the other witnesses?

Ans. Yes, sir.

4. Asher Bijur is dead, is he not?

Ans. Asher Bijur has been dead for the last three years.

5. You are the executor of his estate, I believe?

Ans. Yes, sir.

6. Do you remember the period during which you were in business as cigar manufacturer?

Ans. Yes, sir.

7. Were you engaged with him in business?

Ans. Yes, sir.

8. In what capacity?

Ans. I was the foreman to do all the in-door business; he was entirely occupied in the out-door business.

9. Do you know that he manufactured cigars of a brand "La Normandi?"

Ans. Yes, sir.

10. When did he first manufacture them?

Ans. He commenced to manufacture them in about 1857 or 1858.

11. Were you acquainted with cigars manufactured generally throughout the United States and the cigars imported into the United States at that time?

Ans. I was.

12. Did you know before you manufactured those cigars in
48 your brother's establishment of the brand "La Normandi" being made by any one?

Ans. No, sir.

13. Or "Normandi?"

Ans. No, sir.

14. What do the words "La Normandi" mean, if they had any meaning?

(Objected to.)

(Answer taken subject to objection.)

Ans. I will explain what it means. There was manufactured here at the time a cigar——

15. What does it mean?

Ans. "La Normandi" means nothing. The original name was taken from the province of Normandy, and the "La" was added by the printer.

16. You meant it for "La Normandi?"

Ans. My brother, not knowing exactly how to word it, first had it printed "El Normandi," and the printer told him "La Normandi" would be more correct, as representing the province of Normandy, in France.

17. And he adopted that suggestion?

Ans. Yes, sir; he adopted that afterwards, and I will explain that if you will allow me. When we wanted to adopt a new brand we tried to find a name suitable, but the name itself could not be registered; therefore we had to produce a picture, and we had to give that picture a name, and so it was registered and copyrighted. We suggested the picture and gave that picture the name of "La Normandi," so that it would be protected. The picture was printed to represent a table of cigar-makers and some plants of tobacco; that was my suggestion. I had to do all the in-door work while my brother attended to all the out-door work, and therefore it came under my supervision to suggest the picture.

18. And this is the picture on Exhibit A?

49 Ans. Yes, sir; except that in the original "A. Bijur" appeared instead of "M. S."

19. And the initials were "A. B." in the centre of the label?

Ans. Yes, sir.

20. Otherwise the label was the same?

Ans. Yes, sir; but it was the principal thing to protect, the name of "La Normandi," and therefore we gave that picture that name.

21. And you copyrighted it about that time?

Ans. My brother copyrighted it, because the factory was in my brother's name.

22. And he copyrighted it in what year?

Ans. It must have been either in 1856 or 1857; somewhere along about that time.

23. Of what materials were the cigars manufactured?

Ans. Seed and Havana.

24. And how were they put up?

Ans. They were put up, at my suggestion, in plain quarter boxes. We had a paper inside—white paper—and that label was pasted on the inside on the top of the white paper. (Witness refers to Exhibit A when he speaks of the paper.) I do not mean exactly that paper, but a paper of the same character with the name of A. Bijur on it.

25. Who made the labels at that time?

Ans. Mr. Heppenheimer.

26. And who made your boxes?

Ans. George Wicke & Company.

27. Did you ever hear of any one using that name prior to the time that your brother discontinued manufacturing cigars?

(Objected to.)

(Answer taken subject to objection.)

Ans. They attempted it.

28. And he stopped it?

Ans. He stopped it every time.

50 29. And your brother continued to use it down to what time?

Ans. Until he stopped manufacturing.

30. And that was when?

Ans. That must have been in 1864. I believe it was in June, 1864. It was at that time that he stopped manufacturing.

31. And when did Mr. Stachelberg begin manufacturing? Do you know?

Ans. As far as I remember, he commenced manufacturing previous to our stopping, if I remember correctly.

32. I mean this particular brand of cigars.

Ans. That was done as soon as we stopped manufacturing. People came and asked us where they could get the same cigars——

(Mr. HERSHFIELD: I object.)

33. Did you ever see any written assignment from your brother to Mr. Stachelberg?

Ans. No, sir; I never did.

34. You never heard your brother speak of it?

(Objected to.)

(Answer taken subject to objection.)

Ans. Yes, sir. As far as speaking was concerned, he did speak to me on that subject.

35. What did your brother say to you in respect to it?

(Objected to.)

(Answer taken subject to objection.)

Ans. He consulted with me on any and every subject that happened in the business. As he had the out-door business to attend to and all the in-door business was left to me, he always consulted me, and we consulted together as to whom we should give the brand to, and he said that he would give it to Mr. Stachelberg; that he would take good care of it; that he might manufacture one of the brands, and I agreed, provided my brother would superintend
51 the manufacture of that one brand so as not to injure it, because it was not decided altogether that we would give up the business entirely. Then it was decided that Mr. Stachelberg should manufacture these cigars of that brand.

36. Do you know whether your brother was in the habit of going to Mr. Stachelberg's place from time to time?

Ans. Yes, sir.

37. Did you know that Mr. Stachelberg was using that brand?

Ans. Yes, sir.

38. Did your brother know of it?

Ans. Yes, sir. It was with his consent.

39. Did Mr. Stachelberg buy tobacco from your house at that time?

Ans. As far as I know, he bought from our place.

40. He bought the tobacco for the manufacture of these very cigars from your place?

Ans. Yes, sir.

41. And the quality of that tobacco was what?

Ans. To be as nearly of the same material as we had used in the manufacture of those cigars.

42. And that was good material?

Ans. The best material that could be had.

By Mr. HERSHFIELD: The best material of that kind?

Ans. Yes, sir; the best material of that kind.

44. Your brother never resumed the cigar business?

Ans. No, sir.

45. And Mr. Stachelberg continued the use of the brand to your knowledge and your brother's?

Ans. Yes, sir.

46. Do you know of your brother making any objection to Mr. Stachelberg's using that brand?

(Objected to.)

(Answer taken subject to objection.)

Ans. No, sir; never.

52 47. Did he ever speak to you about Mr. Stachelberg's use of the brand after your brother had stopped using it?

Ans. Yes, sir; often.

48. What did he say with reference to it?

(Objected to.)
(Answer taken subject to objection.)

Ans. Whenever we got an order for tobacco to be selected it was to be selected in such a way that it would be proper to produce these cigars, and I, being the salesman, had to look out for that.

49. And that continued for how many years?

Ans. Until my brother's death.

50. That you supplied tobacco especially for this brand of cigars?

Ans. Yes, sir.

51. It was especially fitted for these cigars.

Ans. Yes, sir.

52. What was the reputation of the cigar while your brother was manufacturing it?

Ans. The reputation was good. That is all I can say in regard to it.

53. And the character of the cigars made by Mr. Stachelberg of that brand—how did it compare with what your brother had made?

Ans. That I could not say, because I never was so intimate in Mr. Stachelberg's factory as he was. I could not say what I did not know.

54. As executor of the estate of your brother you have known Mr. Stachelberg, of Stachelberg & Company, using this brand, have you not?

Ans. Yes, sir.

55. And, so far as you know, they are entitled to the use of it?

(Objected to.)
(Answer taken subject to the objection.)

53 Ans. Yes, sir.

56. It is entirely with your consent that they used this brand?

(Objected to.)
(Answer taken subject to the objection.)

Ans. They need not have my consent, because the consent was given by my brother.

57. This ribbon that your brother had for the purpose of tying up the cigars—was that of a peculiar character?

Ans. Yes, sir; it was my own invention.

58. What was its color?

Ans. It was yellow and red.

59. Did you ever know of any other brand being tied up in that way?

Ans. No, sir.

60. And did Mr. Stachelberg continue to use the same ribbon?

Ans. Yes, sir.

61. And you never knew of anybody else using it except yourself and Mr. Stachelberg?

Ans. No, sir; I never did.

62. Where did you procure that ribbon?

Ans. We imported it from Europe.

63. Was it made to your order?

Ans. We ordered it direct through a commission house in Europe.

64. And you never knew of anybody else using that peculiar kind of ribbon?

Ans. They tried it, but we stopped it.

Cross-examination by Mr. HERSHFIELD:

X 65. The trade-mark of your brother, then, as I understand you, were the words "La Normandi?"

54 Ans. In connection with that picture.

X 66. And the initials of your brother were added to indicate the origin or ownership of that trade-mark?

Ans. No, sir; that was to show that the cigars were made by A. Bijur; to distinguish these cigars from any other imported cigars; to show that A. Bijur, of New York, made these cigars.

X 67. Then the addition of those initials was to indicate the place where they were made and the name of the owner of that trade-mark, "La Normandi;" is that so?

Ans. No, sir.

X 68. The trade-mark, as I understand you, consists of the words "La Normandi," does it not?

Ans. Including the picture; that was the name of the picture, and the words "La Normandi," together with the picture, constituted the trade-mark.

X 69. What was the trade-mark—the picture or "La Normandi?"

(Objected to on the ground that it calls for an opinion of the witness on a question of law.)

Ans. Both.

X 70. The picture and the words "La Normandi" constitued the trade-mark, if I understand you?

Ans. That constitutes the brand.

X 71. Then there were added the initials of your brother to indicate the ownership and the place where the cigars were made?

Ans. I suppose so.

X 72. Don't you know?

Ans. I cannot tell you, because that was a later thought, and the name was added so as to distinguish that from an imported cigar, or so that no imported cigar should come under that name.

X 73. So I understand you that when that trade-mark was orginally used by your brother in his business it consisted only of the words "La Normandi" and the picture?

55 Ans. That is all.

X 74. With no addition of the name?

Ans. That was a suggestion that I made; in order to complete the whole thing we put the name on it.

X 75. And that was only done to identify the owner of the trade-mark or to whom it belonged?

Ans. To identify the manufacturer of that brand of cigars. All our cigars had "A. Bijur" on the top of the boxes.

X 76. Would the addition of the name, then, indicate that he was the manufacturer of other cigars besides that brand?

Ans. No, sir; but it would indicate that he was the manufacturer of that brand. It had nothing to do with other brands. A. Bijur's name was known as manufacturer in New York of different brands.

X 77. In addition to the words "A. Bijur" indicating the ownership of this particular trade-mark it was also added for the purpose of a general advertisement of himself?

Ans. Yes, sir.

X 78. You say that your brother, after his arrangement with Mr. Stachelburg, did not know but what he might resume the manufacture of that brand, "La Normandi?"

Ans. I did not say so.

X 79. You stated on your direct examination that your brother did not know but that you might resume the manufacture of that brand?

Ans. That we might resume—not he. I was a partner in the business.

X 80. Were you a member of the firm?

Ans. Yes, sir; I was a silent member—that is, I had an interest in the business. I had a half interest in the partnership, but the firm name was A. Bijur.

X 81. The firm was carried on under the name of A. Bijur?

Ans. Yes, sir.

X 82. And you say you were a partner in that firm?

56 Ans. Yes, sir, as far as the manufacturing business was concerned.

X 83. When you say that you were a silent partner did you mean that you were a limited partner by law?

Ans. I was not limited at all. I was limited in so far that I would have nothing to pay in case he failed, because he would assume all the payment.

X 84. You mean you were a secret partner?

Ans. Yes, sir; a secret partner.

X 85. You were not limited by statute?

Ans. No, sir.

X 86. Then the firm of A. Bijur had the right to resume the manufacture of those cigars?

Ans. Yes, sir.

X 87. And do you mean to say that there was an absolute assignment?

Ans. That I could not tell.

X 88. You never heard of an absolute assignment from that firm to Mr. Stachelberg?

Ans. That I would not say.

X 89. It was a license for the use of that trade-mark?

Ans. Yes, sir.

Redirect examination:

90. You discontinued business in 1864?

Ans. Yes, sir, as manufacturer of cigars.

91. Up to that time you say you were a secret partner. Had you anything to do with the losses in the business?

Ans. Yes, sir, if there were losses in the manufacturing business.

92. What other business was there?

Ans. We were in the tobacco business.

93. But you had nothing to do with the tobacco business?

57 Ans. No, sir; not with the losses.

94. If there was a profit in the tobacco business then you had a share in the profits?

Ans. Yes, sir.

95. And that was in lieu of salary?

Ans. I had no salary. I received that as a share of the profits.

96. The business was in the name of A. Bijur and under his control?

Ans. Yes, sir.

97. And he abandoned business in 1864?

Ans. He abandoned the factory. We stopped manufacturing cigars.

98. And you know the fact to be that Mr. Stachelberg did not begin to manufacture cigars until some time in 1866?

Ans. I guess Mr. Stachelberg was mistaken about that, because he had bought tobacco from us earlier than that.

99. Does it follow from that that he bought tobacco for this particular brand?

Ans. No, sir.

100. Do you know of his having made cigars of this brand prior to January, 1866?

Ans. No, sir.

101. That is the time when he began manufacturing these cigars?

Ans. Yes, sir.

102. During the interval between 1864 and 1866, your brother had made up his mind as to whether he would resume manufacturing cigars or not?

Ans. Yes, sir.

103. And in 1866 you and your brother, having made up your minds not to resume the manufacture of these cigars, assigned the right to Mr. Stachelberg?

Ans. Yes, sir.

104. And there was no intention on either your part or

58 your brother's in 1866 to resume the manufacture of these cigars?

Ans. No, sir.

Recross-examination:

X 105. But prior to 1866 Mr. Stachelberg had already commenced the manufacture of this brand of cigars?

Ans. No, sir; he had not.

X 106. Did not you testify that he had bought tobacco for the purpose of making these cigars prior to 1866?

Ans. Not these cigars. He had bought tobacco from us for the purpose of making cigars previous to that time, but not this particular brand.

X 107. Did I understand you to say that in 1866 you and your brother had given up business altogether?

Ans. We had so far as manufacturing cigars was concerned.

X 108. You continued in the tobacco business until when?

Ans. I am in it now.

X 109. Did you not testify, on your direct examination, that you sold Mr. Stachelberg tobacco to make up this particular brand of cigar?

Ans. Yes, sir.

X 110. Did not you do that prior to 1866?

Ans. No, sir; not for that brand of cigars.

X 111. Did I understand you to say that you had a half interest in the profits of that business?

Ans. Yes, sir.

X 112. And you were a partner in that business?

Ans. Yes, sir.

X 113. And the name of A. Bijur was the firm name?

Ans. Yes, sir.

X 114. And the firm consisted of yourselfand your brother?

59 Ans. Yes, sir.

X 115. Did you ever sign an assignment to Mr. Stachelberg?

Ans. No, sir.

X 116. Did you ever see any written assignment signed by your brother?

Ans. No, sir.

Redirect examination:

117. All the business was done in the name of A. Bijur?

Ans. Yes, sir.

118. Who signed the checks in your business?

Ans. My brother.

119. And he attended to all of the clerical business?

Ans. Yes, sir.

120. And if he made an assignment it was signed by him?

(Objected to.)

(Answer taken subject to objection.)

Ans. Yes, sir.

121. And if he made an assignment it was all right, as far as you were concerned?

Ans. Yes, sir.

122. And if he made an assignment he had a perfect right so to do?

Ans. Yes, sir; but he never did it unless he consulted with me.

123. And he did consult you with reference to this assignment?

Ans. Yes, sir.

124. And you have always supposed that it was so assigned?

Ans. Yes, sir.

125. And you have neither individually nor as executor made any claim against Mr. Stachelberg?

Ans. No, sir.

I. BIJUR.

60 Subscribed and sworn to before me this 14th day of May, 1883.

JOHN A. OSBORN,
U. S. Commissioner.

Deposition of Moses Kind.

Direct examination by Mr. LAUTERBACH:

Int. 1. You are a member of the firm of M. Stachelberg & Company?

Ans. Yes, sir.

2. When was that firm formed?

Ans. On the 1st of January, 1873.

3. Under written articles of copartnership?

Ans. In the first year there were written articles of copartnership.

4. And that terminated at the end of that year?

Ans. Yes, sir.

5. And the partnership has continued ever since?

Ans. Yes, sir.

6. Was there any arrangement made after the termination of the first year's copartnership?

Ans. A portion of the profits and losses were changed?

7. In other respects it remained the same?

Ans. Yes, sir.

8. Have you that written partnership agreement?

Ans. I tore it up some years ago.

9. What did you, respectively, contribute to the firm?

(Objected to as incompetent and on the ground that it appears in evidence that there were two copies of the articles of agreement and the loss of them has not been shown.)

61 (Answer taken subject to the objection.)

Ans. I contributed cash and Mr. Stachelberg contributed his entire business as it then existed, the value to be determined thereafter, and it was so determined.

10. He was at that time using the trade-mark "La Normandi?"

Ans. He was using the brand "La Normandi."

11. He was manufacturing cigars of the brand "La Normandi?"

Ans. Yes, sir.

12. With a label like Exhibit A—that is, a *fac-simile* of the label that he then used?

Ans. Yes, sir.

13. With the same picture, the same name, and the same peculiarities?

Ans. With the same everything; we never changed anything on that label.

14. And the brands of cigars known as "La Normandi," since your entering into copartnership with Mr. Stachelberg, have been traded in for whose account?

Ans. For account of M. Stachelberg & Company.

15. And for neither of you individually?

Ans. No, sir; for both of us together.

16. When you first became connected with the business how large was the sale of this brand?

Ans. Well, I would like to state in connection with that, if the gentleman will allow me, that at that time we did not keep any stock books and I tried to go over the old accounts, but I did not have time; I tried to bring in a complete account, but I have only had time enough to go back as far as 1876.

17. Please state how many of the brand of cigars known as "La Normandi" you have manufactured since 1876.

(Objected to as immaterial and incompetent.)

(Answer taken subject to the objection.)

62 Ans. We packed them in two different packages for the Eastern States and for the Western States. For the Eastern States we packed them in quarter packages and for the Western States in tenth packages.

18. Give them each separately.

Ans.—

Years.	Quarters.	Tenths.
1876	150,000	50,000
1877	300,000	65,000
1878	450,000	40,000
1879	450,000	100,000
1880	850,000	80,000
1881	1,100,000	150,000
1882	1,800,000	250,000

I can give you four months and eleven days of this present year if you desire it.

19. So that the business has been a gradually increasing one?

Ans. Yes, sir.

20. And the quarters, you say, were sold to the Eastern States?

Ans. Yes, sir.

21. And the tenths to the other States?

Ans. Yes, sir.

22. What is the quality of that cigar?

Ans. It is a seed Havana cigar, made with Connecticut wrappers and binders and Havana fillings; made by hand strictly, not in forms.

23. And, compared with other domestic cigars, what can you say of it as to its grade?

Ans. I believe it to be one of the finest domestic cigars of that grade in the United States.

24. By that grade you mean seed and Havana cigars?

Ans. Yes, sir.

25. Have you agencies in the East?

Ans. We have one agency in the East. When I came into the firm our agent in Boston was Henry Nelson; he retained
63 the agency until January 1st, 1878, when we made arrangements with Estabrook & Eaton, who have the agency still.

26. They are entrusted with the development of the business in the East?

Ans. They do all the traveling, pushing, and selling of the cigars in the East; we simply supply them with the cigars and fill their orders.

27. How does the sale of the brand in the Eastern States compare with the sale of other brands of yours?

Ans. It is the principal brand of our cigars in the Eastern States.

28. You manufacture other ones?

Ans. Yes, sir; lots of them.

29. But this brand is a popular brand among your brands in the Eastern States?

Ans. Yes, sir.

30. When did you first know of this brand being imitated?

Ans. To the best of my knowledge, in the year 1878. Allow me to modify that; I mean the year 1880.

31. By whom?

Ans. I was in the city of Boston and I was shown a box of cigars which were made by a man whose name, I believe, was Gilette. I saw an imitation of his "La Normandi," spelled precisely as we spell ours.

32. What did you do in respect to it?

(Objected to as incompetent.)

Ans. I went to see a lawyer about it. I saw Mr. Morse in relation to it. Mr. Morse, in my presence, wrote a letter to this man telling him that if he did not discontinue the use of that brand that we would prosecute him. On my return to New York, or within a short time thereafter, Mr. Morse sent me the answer of Mr. Gilette. When I say Gilette I am not positive that that was his name. Mr. Gilette said that he would discontinue the use of the brand, and
64 although he had made some cigars and had packed them in that brand, he would repack them in another name.

33. What next did you do?

Ans. I do not remember the name of the other party, but I think it was Mr. Corey, another man of Boston, with whom a similar course was pursued.

34. When did you first know of the defendant's making this brand?

Ans. I think it was in the early part of 1882 that I heard of it.

35. Did you see any of the cigars made by him?

Ans. He don't make any cigars—at least, so I have been told.

36. In what manner did he put up his cigars? Do you know anything about his manner of dealing in them?

(Objected to.)
(Question withdrawn.)

37. Is there anything that you know about his cigar?
Ans. Yes, sir.
38. State what it is you saw.
Ans. I saw the place where Mr. Ponce orders his cigars to be made in Boston.

By Mr. HERSHFIELD:

39. Did you hear him order them?
Ans. No, sir; but his name is on the box; I saw the box and I saw the cigars.
40. Containing the cigars of what brand?
Ans. "La Normanda." It was exactly spelled as ours, except that we spell ours "di" and he uses "da."
41. In other respects, how does his brand compare with yours?
Ans. His cigars look to be of the same size; they are packed the same, bundled the same, they are tied with the same kind of ribbon that we formerly used, but they are not the same cigars.
42. That is the red and yellow ribbon?
65 Ans. Yellow edges and red centers. That is about it—the same as this order on Exhibit A.
43. Did you see the exhibit of cigars that were produced in evidence upon the hearing for an injunction in this case, as coming from Mr. Ponce's place?
Ans. I have seen them in Boston; yes, sir.
44. You have seen the exhibit?
Ans. We bought the cigars so as to have them as an exhibit.
45. And that box of cigars is the one that was used as an exhibit on the motion for an injunction?
Ans. I did not see them myself. I was not in Portland at the time of the argument on the motion for an injunction.
46. Can you state how these cigars compare with your cigars?
Ans. I think they are inferior in quality.
47. The application for the patent for trade-mark—by whom was that made?
Ans. By M. Stachelberg & Co.
48. That was on the 19th of February, 1876?
Ans. The patent was granted on that day. The application was made some time prior to that. Mr. A. Bijur is a witness to that application in his own handwriting, and that is on exhibit in Portland.

Cross-examination by Mr. HERSHFIELD:

X 49. You say you saw the box of cigars in Boston with the words "La Normanda?"
Ans. Yes, sir.
X 50. Are you certain of the "La?"

Ans. No, sir; I am not. I think it was "Normanda" without the "La."

X 51. That is your recollection?

66 Ans. Yes, sir.

X 52. And that no "La" appeared on the box?

Ans. I do not think it appeared on the box.

X 53. Did you make an examination of those cigars?

Ans. Yes, sir; I did.

X 54. Did you smoke any of them?

Ans. No, sir.

X 55. Did you open any of the cigars?

Ans. No, sir.

X 56. Did you break any cigars to examine them?

Ans. No, sir.

X 57. You made no other examination of them than a mere inspection?

Ans. Not at that time and place.

Redirect examination:

58. Subsequently did you make an examination?

Ans. Yes, sir.

59. To what extent?

Ans. I smoked a cigar about a quarter and after smoking it I opened it.

60. And comparing it with your cigar, of your manufacture, you rely upon your examination of that time?

Ans. Yes, sir.

(Mr. Hershfield states that he was only retained in the case this morning and that he is not thoroughly familiar with it, so that it is consented that all the testimony herein be taken subject to any legal objection or exception by either side on the trial of this case, except as to the form of questions.)

MOSES KIND.

67 Subscribed and sworn to before me this 14th day of May, A. D. 1883.

JOHN A. OSBORN,
U. S. Commissioner, S. D. N. Y.

Adjourned to May 15, 1883, 1 p. m.

NEW YORK, *May* 15, 1883—1 p. m.

Present: All parties.

Deposition of Michael Flood.

Direct examination by Mr. LAUTERBACH:

Int. 1. Mr. Flood, what is your occupation?

Ans. Cigar-box business.

2. How long have you been in that business?

Ans. I have been in that business and the cigar business over

thirty years. I have been going to a cigar-box factory for thirty-two years—from a cigar factory to a cigar-box factory to order boxes.

3. So that you have been either in the cigar-box business or the cigar business for the last thirty years?

Ans. Yes, sir.

4. Do you know a brand of cigars known as "La Normandi" cigars?

Ans. I do.

5. By whom are they made?

Ans. When I first knew them they were made by Mr. Bijur.

6. And are now being made by whom?

Ans. I believe Mr. Stachelberg.

68 7. Were you familiar with cigars imported to this market, as well as domestic cigars?

Ans. Pretty well; yes, sir.

8. You had a knowledge of the brands that were imported to the city of New York.

Ans. I am supposed to be a pretty good judge of that.

9. Your business has called for that?

Ans. Yes, sir; that has been a specialty of my business.

10. Did you know of an imported cigar known as "La Normandi" or "La Normanda," or "Normandi" or Normanda?"

Ans. I never did.

11. Did you ever know of a domestic or imported cigar with either of the four appellations that I have named prior to the Bijur cigar?

Ans. I remember "La Norma," I think, to the best of my knowledge, before I remember the "Normandi" or about the time.

12. The nearest you remember to any of the four terms that I have given you was "La Norma?"

Ans. Yes, sir.

13. That was imported prior to the manufacture of "La Normandi" by Bijur?

Ans. Yes, sir.

Cross-examination by Mr. HERSHFIELD:

X 14. What is your present business?

Ans. Cigar-box business.

X 15. Cigar-box manufacturer?

Ans. Yes, sir.

X 16. Where is your place of business?

Ans. 297 Monroe street.

X 17. In this city?

Ans. Yes, sir.

69 X 18. How long have you been in the cigar-box business there at that address?

Ans. I have been there twelve, thirteen, fourteen, or fifteen years—something like that.

X 19. In this cigar-box business?

Ans. In this same business, with Mr. Hencken.

X 20. Are you a clerk for Mr. Hencken?

Ans. No, sir.
X 21. What is your relation to him?
Ans. I am a canvasser for him. I go out and get orders.
X 22. Get orders for cigar boxes?
Ans. Yes, sir.
X 23. You have been doing that for fifteen years?
Ans. I think so—twelve or fifteen.
X 24. As his employee?
Ans. Yes, sir.
X 25. What was your business before that?
Ans. Cigar-box business.
X 26. Also as a canvasser?
Ans. No, sir.
X 27. As a manufacturer?
Ans. Yes, sir.
X 28. On your own account?
Ans. Yes, sir.
X 29. Where was your place of business?
Ans. 9 and 11 Baxter street, New York city.
X 30. Were you a member of any firm at that time?
Ans. I was in business by myself.
X 31. You had no partner?
Ans. I had a partner before, but I bought him out, and he died.
X. 32. You were at that time a cigar-box manufacturer?
Ans. Yes, sir.
X 33. How long were you in that line of business?
Ans. Four or five years.
70 X 34. That carries us back twenty years, does it?
Ans. Yes, sir.
X 35. What was your business before that?
Ans. I was in the cigar business.
X 36. Where?
Ans. I worked for Joseph Hall, now deceased.
X 37. You were his clerk?
Ans. No; I was a cigar-maker for him.
X 38. You were a cigar-maker for Joseph Hall, now deceased?
Ans. Yes, sir. I think it was in 1859 or 1860.
X 39. Where was his place of business?
Ans. Corner of Barclay and Greenwich streets.
X 40. Did he do a wholesale or retail business—this Hall?
Ans. He did both.
X 41. And you were one of the workmen in the back part of the store?
Ans. Yes, sir.
X 42. Working at making cigars?
Ans. Yes, sir.
X 43. That was your entire occupation there?
Ans. Yes, sir.
X 44. How long did that last?
Ans. I worked for him a few months.
X 45. What did you do before that?

Ans. I was stripper boy and a box-paster, trimming cigar boxes.

X 46. Working for whom?

Ans. For Powell and Henry.

X 47. Where was their place of business?

Ans. I think it was 109 Beekman street.

X 48. That was your entire occupation there—stripper?

Ans. Stripper and trimming cigar boxes.

X 49. Have you ever been in the cigar business on your own account?

71 Ans. No, sir.

X 50. You have never been in the cigar business in any other relation than that of a stripper or a workman?

Ans. No, sir.

X 51. That is your entire connection with that business?

—. ——.

X 52. Subsequent to that you were a canvasser for cigar-box makers?

Ans. Yes; and I was in business myself in box-making. I succeeded Caleb Kerby, the oldest box-maker in existence that I know of.

X 53. During your experience as a cigar-box canvasser you took orders wherever you could get them?

Ans. Yes, sir.

X 54. And your employer made or printed such brands as you got?

Ans. Yes, sir.

X 55. And those that you did not get you did not learn anything about, did you?

Ans. No, sir.

Redirect:

56. Had you any general knowledge, outside of the direct business of your employer's concern, as to existing brands?

Ans. Yes, sir. I guess, as a general thing, I know every brand in the factory, more or less.

57. I mean outside of the factory.

Ans. And outside of the factory. It is my business to know of existing brands.

58. Ever since you have been in the cigar-box business?

Ans. Yes, sir.

59. And while you were a cigar-maker did you take an interest in knowing what the different brands were?

Ans. Yes, sir.

72 60. So that you had knowledge derived outside of your immediate relation to your employers?

Ans. I never served any time in cigar-making. I learned cigar-making while I was trimming boxes, &c. The first job I ever held was in 1858 or 1859. At that time I knew about the "La Norma."

61. And you knew about imported cigar brands generally, did you?

Ans. Well, pretty nearly so.

Recross:

X 62. You have been successively stripper, workman, cigar-box manufacturer, and clerk to a cigar-box manufacturer?

Ans. Yes, sir; and an imitator of all brands.

X 63. As connected with those occupations?

Ans. Yes, sir.

X 64. Will you state how it became necessary for you to familiarize yourself with the various existing brands of cigars in the country?

Ans. When I was a box-trimmer it was always my idea to find out how they were trimmed, and the brands that were put on them I always made it a specialty to watch closely. I don't suppose that in 1858 or 1859 any cigars were imported to New York but what I had the trimming of the boxes.

X 65. That is the only way you derived any knowledge?

Ans. Yes, sir.

M. FLOOD.

Subscribed and sworn to before me this 15th day of May, 1883.

JOHN A. OSBORN,
U. S. Commissioner, S. D. N. Y.

73 *Deposition of Louis S. Frank.*

Direct examination by Mr. LAUTERBACH:

Int. 1. What is your business, Mr. Frank?

Ans. I was from my earliest youth in the merchant business.

2. What is your present business?

Ans. Cigars and tobacco.

3. Are you an importer of cigars?

Ans. Yes, sir.

4. You are a member of what firm here?

Ans. Louis, Philip, and John Frank.

5. How long has that firm been in existence?

Ans. Since 1856.

6. And since that time have you imported cigars?

Ans. We began importing cigars in October, 1858, from Havana.

7. Were you familiar with the brands of Havana cigars that came to this market?

Ans. I think I was; yes.

8. And your transactions in Havana cigars—your importation of and dealing in Havana cigars—have continued from 1868 down to the present time?

Ans. Yes, sir.

9. Have you ever known of a brand of imported Havana cigars known as "La Normandi" or "La Normanda" or "Normandi" or "Normanda" during that period?

Ans. I have not.

10. Have you known of a brand known as "La Norma?"

Ans. Yes, sir.

11. Is that the nearest appellation to the appellations that I first mentioned which you first knew of?

Ans. That is more than I can say. I knew the cigars under the name of "La Norma."

74 12. Did you know of anything else that was like "La Normandi" or "La Normanda" or "Normandi" or "Normanda" other than "Norma?"

Ans. I have not the slightest recollection of it.

13. You do not know of anything else?

Ans. No, sir.

14. That is the nearest you know to it?

Ans. I never have heard of any of the names except "Norma."

Cross-examination by Mr. HERSHFIELD:

X 15. Where is your place of business?

Ans. It was 146 and 148 Pearl street.

X 16. Where is it now?

Ans. 34 Beaver street since the last six or seven years.

X 17. Have you been a resident here all that time?

Ans. Up to 1871; then I moved over to Brooklyn, and since I am a resident of Brooklyn.

X 18. You have never been to Cuba?

Ans. No, sir.

X 19. Or Havana?

Ans. No, sir.

X 20. Do you mean to say you are familiar with every brand of Havana cigars that existed in the year 1858?

Ans. I remember many brands from that year. I could name you brands I know from that year, but I do not remember these brands.

X 21. There might have been such a brand and you not remember?

Ans. I think I would know it.

X 22. Is it not possible there was such a brand and you did not know it?

Ans. It might be.

X 23. Don't there exist a great many brands of cigars
75 which are either not sufficiently popular or sufficiently extensive to become well known in the market?

Ans. I think not a great many.

X 24. There are some?

Ans. Maybe. I do not know of it. I know most of the brands from Havana.

X 25. Do you do a wholesale business?

Ans. Yes, sir.

L. S. FRANK.

Subscribed and sworn to before me this 15th day of May, 1883.

JOHN A. OSBORN,
U. S. Commissioner, S. D. N. Y.

Deposition of Otto Heppenheimer.

Direct examination by Mr. LAUTERBACH:

Int. 1. What is your business?
Ans. Lithographer and printer.
2. Your specialty in business is what?
Ans. Cigar labels.
3. What is your present firm?
Ans. Heppenheimer & Maurer.
4. And that firm is a successor of——
Ans. F. Heppenheimer & Co.
5. F. Heppenheimer was your father?
Ans. Yes, sir.
6. He is now dead?
76 Ans. Yes, sir.
7. How long was he in business?
Ans. In the present business since 1849.
8. How long have you been in business?
Ans. Since 1873.
9. Since you have been in business have you been manufacturing for M. Stachelberg the labels similar to Exhibit A, now shown you?
Ans. Yes, sir; that is our label.
10. Manufactured for whom?
Ans. Mr. Stachelberg.
11. Have you manufactured them for any one else?

(Objected to as immaterial and incompetent.)

Ans. No, sir; we have manufactured them for somebody else. We formerly manufactured them for Mr. A. Bijur.
12. When was that?
Ans. In 1858; from 1858 down.
13. Have you a record of your labels?
Ans. Yes, sir.
14. Preserved in a book?
Ans. Yes, sir; here they are—the samples. (Witness produces book.)
15. Have you a sample of the label manufactured for Mr. Bijur?
Ans. Two different samples—the first one and the second one.
16. Which appear from the record to have been manufactured when?

Mr. HERSHFIELD: This series of questions is objected to.

Ans. The first one was delivered May 19, 1857.
17. That appears by your delivery book?
Ans. Yes, sir.
18. Of that date?
Ans. Yes, sir; charged here—that is, the plain one.
77 19. You say you had samples of the labels that appear in your record book in their regular order—as of what date?

(Same objection.)

Ans. The first black label was delivered May 19, 1857; that is the old one. Then the regular one—the one you have got there—dates from March 1, 1859.

20. So that labels like Exhibit A were first manufactured for Mr. Bijur in 1859?

Ans. Yes, sir.

21. And you now produce a label printed in black?

Ans. That was the first one Mr. Bijur ever had, and then he changed it into these colors. The first label he had was a black one such as this.

Mr. LAUTERBACH: I offer this black label in evidence.

(Objected to as incompetent.)

(It is marked "Exhibit C, May 15, 1883.")

22. Exhibit C continued to be manufactured how long?

Ans. Only for about a year.

23. Exhibit C was manufactured from what time to what time?

Ans. From May 19th until label Exhibit A was first delivered, which was March 1st, 1859.

24. Have you one of the labels similar to Exhibit A, manufactured for Mr. Bijur?

Ans. Yes, sir. This one was printed from 1858 down to the time Mr. Stachelberg took it (indicating label in book).

(Said label is offered in evidence, and it is marked "Exhibit D, May 15th, 1883.")

(Same objection.)

25. These labels appear in regular order, you say, on the files of the record book of your house?

(Same objection.)

Ans. Yes, sir.

26. And you take these labels from your record?

Ans. Yes, sir.

78 27. That record has always been a correct one?

(Objected to.)

Ans. Yes, sir.

28. Will you look at your delivery book and state to me when the first order for labels by Mr. Bijur of "La Normandi" appears?

Mr. HERSHFIELD: I object to the witness testifying from the book, no foundation having been laid for it.

Ans. In 1857, May 19th.

29. What is the book you read from?

Ans. The regular business book.

30. What do you call it?

Ans. It is a regular charge book, from the way it looks here.

31. Of what year?

Ans. From 1857 down, I think.

32. In whose handwriting is it?

Ans. It is in the old book-keeper's.

33. Where is he?
Ans. He is dead.
34. And the first order for the new label is in whose handwriting?
Ans. My father's handwriting.
35. Is he dead, too?
Ans. Yes, sir.
36. Do you rocognize the handwriting of both?
Ans. I cannot recognize this other handwriting, but I know this is my father's handwriting.
37. You find in your father's handwriting an order for Exhibit D of what date?

(Objected to.)

Ans. March 21, 1859.
38. Have you looked for an order among your papers from Mr. Bijur to your house to manufacture these labels for Mr. Stachelberg?

79 (Objected to as immaterial.)
(Question withdrawn.)

Ans. No, sir.

Cross-examination by Mr. HERSHFIELD:

X 39. Were you connected with your father in business in the year 1858?
Ans. No, sir; I began in 1873.
X 40. You have testified to some orders given in 1858, have you not?
Ans. I have.
X 41. Were you connected with your father in business at that time?
Ans. No, sir; I get it from the books.
X 42. All that you have testified to is derived from the books?
Ans. Yes, sir.
X 43. And you don't know in whose handwriting the entries are in that book except those you say are in your father's?
Ans. Yes, sir; and the book-keeper's.
X 44. You don't know that it was his handwriting except from what you have been told?
Ans. His handwriting runs through all the books, and I know it is his handwriting.
X 45. You infer from the fact that there was a book-keeper and all the writing is in his handwriting that he wrote it?
Ans. Yes, sir.
X 46. But you never saw him write?
Ans. No, sir.
X 47. And you don't know that it is his handwriting?
Ans. No, sir.
X 48. And in testifying to labels, Exhibits C and D, you have no personal knowledge of them except from finding them in the book which contains labels?

80 Ans. No, sir. They were printed before my time.

X 49. And of those you have no personal knowledge?

Ans. Simply from information, through the books, and so on.

X 50. You know nothing about them except the fact that you find them in a book which contains labels in your father's business?

Ans. Yes, sir; and in the charging books that were kept in the office at that time.

X 51. Look at the pictures in Exhibit C and Exhibit D and state whether they are alike.

Ans. They are not alike.

X 52. They are totally dissimilar, are they not?

Ans. Yes, sir.

X 53. Representing entirely different scenes?

Ans. Yes, sir.

Redirect:

54. And the black one, representing one scene, was continued for about a year, was it?

Ans. Yes, sir.

55. And the other was continued after that?

Ans. Yes, sir; since March 21, 1859.

26. You have made labels for M. Stachelberg & Company?

Ans. We are making them right along.

57. The words "La Normandi" appear on Exhibits A, B, and C?

Ans. Yes, sir; spelled the same way.

OTTO HEPPENHEIMER.

Subscribed and sworn to before me this 15th day of May, 1883.

JOHN A. OSBORN,
U. S. Commissioner, S. D. N. Y.

81 *Deposition of William H. Thomas.*

Direct examination by Mr. LAUTERBACH:

Int. 1. What is your business, Mr. Thomas?

Ans. Cigar importer.

2. Member of what firm?

Ans. W. H. Thomas & Brother.

3. Where?

Ans. 25 Beaver street.

4. New York city?

Ans. Yes, sir.

5. You have been in that business how long?

Ans. Some forty-odd years.

6. An importer of cigars from Havana?

Ans. Chiefly.

7. Has your business been an extensive one during that period?

Ans. Yes, sir.

8. Probably as large as any other house during the last few years?

(Objected to.)

Ans. Well, I think probably yes. Of course, I don't know.

9. During the time you have been in the business have you been familiar with the brands of imported cigars?

Ans. Many of them; yes, sir.

10. Of those which came to the market of New York?

Ans. Yes, sir.

11. Have you during that period known of any imported cigar bearing the brand known as the "La Normandi," or "La Normanda," or "Normandi," or "Normada?"

Ans. I can't call to mind that I ever saw it, sir.

12. Do you know of anything near those appellations—sounding like it?

82 Ans. "La Norma."

13. That you have known for many years, have you?

Ans. I did know it years ago; yes, sir.

14. And nearer than that you can recall nothing?

Ans. It does not strike me; no, sir.

15. You have thought of the matter during the past few days, have you not?

Ans. I thought of "Normandi" to see if I could recollect it.

16. And you have not been able to recollect anything of the kind?

Ans. No, sir.

Cross-examination by Mr. HERSHFIELD:

X 17. You don't carry in your memory the various brands of imported cigars over twenty years back, do you?

Ans. Some yes and some no.

X 18. A great many you do remember and a great many you do not remember?

Ans. That is so; yes, sir.

X 19. There are imported cigars that go to others besides the New York market?

Ans. There is no doubt of it.

X 20. And as to those you have no knowledge or recollection?

Ans. At times I do know of cigars that came here for other markets, but usually no.

X 21. Have you ever been in Havana?

Ans. Yes, sir.

X 22. How long ago?

Ans. About two years, the last time.

X 23. How long did you stay there?

Ans. About a week.

X 24. When were you there the first time?

83 Ans. In 1844, I think it was, as near as my memory serves me—1844 or 1845.

X 25. And you have been there off and on since that time?

Ans. Only twice since.

X 26. While you were in Havana did you ever hear of a brand of cigars known as "La Normandi" or "La Normanda?"

Ans. I have no recollection of having heard of it. I can't say

precisely that I did not, because my recollection will not serve me to that extent; but I have no recollection of it.

Redirect:

27. You can't remember any such brand as the four I have mentioned in the American market?
Ans. No, sir.

W. H. THOMAS.

Subscribed and sworn to before me this 15th day of May, A. D. 1883.

JOHN A. OSBORN,
U. S. Commissioner, S. D. N. Y.

MOSES KIND recalled.

Examined by Mr. LAUTERBACH:

Int. 1. You said you had seen some cigars branded with the defendant's name in Boston?
Ans. Yes, sir.
2. In whose place was that?
Ans. In that of Manuel Caro, 27 Central Wharf, Boston.

MOSES KIND.

84 Subscribed and sworn to before me this 15th day of May, 1883.

JOHN A. OSBORN,
U. S. Commissioner, S. D. N. Y.

MICHAEL STACHELBERG recalled.

Examined by Mr. LAUTERBACH:

I have looked for the copy of the copartnership agreement with Mr. Kind, but cannot find it. I have not seen it for six or seven years. I have looked among all my papers for it, wherever I was likely to find it.

MICHAEL STACHELBERG.

Subscribed and sworn to before me June 1, 1883.

JOHN A. OSBORN,
U. S. Commissioner, S. D. N. Y.

Taken pursuant to the sixty-seventh rule of the Supreme Court of the United States, in equity, as amended.

A. H. DAVIS, *Examiner.*

PORTLAND, *Oct.* 9, 1883.

Present: Clarence Hale, Esq., counsel for complainants; Wm. Henry Clifford, Esq., counsel for respondent.

85 *Deposition of Fred. W. Foster.*

Direct examination by CLARENCE HALE, Esq., counsel for complainants:

Int. 1. State your name, age, residence, and occupation.

Ans. Fred. W. Foster; 42 years old; Cumberland Mills, Me.; commercial traveler for the firm of J. C. Frank & Co., Boston, Mass.

2. What was your occupation in the years 1881 and 1882?

Ans. In June, 1881, I went to work for Ernesto Ponce in the cigar business, in his store, at Portland, Maine, as his clerk, and remained in his employ until the latter part of September or first of October, 1882.

3. State, if you know, whether or not said Ponce during that time manufactured or sold a brand of cigars called "Normanda" or "E. P. Normanda." If yes, state when he began to sell same or to have the same in his store.

Ans. Some time during the last of January or in February or March, 1882, he began to have in his store and to offer for sale a brand of cigars called "E. P. Normanda," as I recollect the name. This is the first — that he used said brand while I was in the store. I think I should have known if he had had it in the store or used it before this while I was there.

4. During the time you were in Ponce's employ did you know of a brand of cigars called "La Normandi," sold by Estabrook & Eaton, of Boston?

Ans. I did; and I knew of their being sold in town here. I had seen them in boxes, and know the way they were put up.

5. State, if you know, where Mr. Ponce got the first "E. P. Normanda" cigars offered for sale by him in the winter of 1882, as you have testified.

Ans. They were manufactured for him in Boston. I never knew of that brand being manufactured for him before that.

86 6. State the manner in which those cigars were put up and offered for sale by Mr. Ponce, as you have testified.

Ans. They were packed 250 in a box, tied up with ribbon, twenty-five in a bundle; packed in the same style as the "La Normandi" cigars of Estabrook & Eaton, same number in a box, same number in a bundle, with a similar ribbon, Mr. Ponce's being, I think, a little lighter color. Packed up in the way I have described; they were sold by Mr. Ponce and by myself, as his clerk, during the spring and summer of 1882. We were selling them right along, but I cannot tell the extent or number of the sales.

7. Was Mr. E. J. Doyle a clerk for Mr. Ponce during any portion of the time you were there?

Ans. He was there from the time I went there up to August or September, 1881.

8. Have you examined the cigars contained in boxes marked "Complainants' Exhibit 2, A. H. D., examiner," and "Complainants' Exhibit 3, A. H. D., examiner?"

Ans. Yes; I have.

9. State whether or not they are, to the best of your knowledge, of the same brand as those offered for sale by Mr. Ponce during and after the winter of 1882, as you have testified.

Ans. They are. Those in Exhibit 2 seem to be like those sold by Mr. Ponce when he first began to offer them for sale, as I have testified; those in Exhibit 3, I should think, came later on.

Cross-examination by WM. HENRY CLIFFORD, Esq., counsel for respondent:

X 10. How were these cigars known or called in the market—"E. P. Normanda" or "Normanda, E. P."—when you sold them for Mr. Ponce?

Ans. I always named them "E. P. Normanda."

87 X 11. Was not that the name, as far as you know, by which that brand of cigars was known in the market?

Ans. Yes; it was.

X 12. Did you sell any when you were away on your routes?

Ans. I did.

X 13. Where?

Ans. I sold them in a number of places in the eastern part of Maine and in the vicinity of Portland.

X 14. They were known as Ponce's cigars, were they not?

Ans. Yes, sir.

X 15. The letters "E. P." were known to be Mr. Ponce's initials, were they not?

(Objected to.)

Ans. They were.

X 16. They were good cigars, were they not?

Ans. Yes, sir.

X 17. Did they have a good sale on account of their own good qualities?

(Objected to.)

Ans. They did.

X 18. Have you, when you sold them, ever represented them to be anybody's manufacture but Mr. Ponce's?

Ans. I have not.

X 19. Did your customers know whose manufacture they were?

(Objected to.)

Ans. They did.

X 20. Have you ever told any of them or heard them or any of them say anything to show that they understood that the letters "E. P." referred to Mr. Ponce's name?

(Objected to.)

Ans. Every one considered the initials to refer to Mr. Ponce—everybody familiar with him.

X 21. That you know to be a fact, don't you?

Ans. Yes, sir.

X 22. In short, it was generally known that "E. P." on those boxes meant Ponce's cigars, was it not?

Ans. Yes, sir.

X 23. Have you ever seen any cigars put up in boxes like Respondent's Exhibit B, A. H. D., Ex'r?"

Ans. I have.

X 24. Seen them on sale in the State of Maine?

Ans. I have.

X 25. Are they not known as a distinct brand of cigars from "E. P. Normanda?"

(Objected to.)

Ans. Yes.

X 26. No trouble in telling them apart, is there?

Ans. None.

X 27. How is it about the cigars themselves—Ponce's and these that are in boxes like Exhibit B; is there not a recognized difference in the cigars themselves?

Ans. I would not be able to say.

X 28. Do you know which are considered the best among those people where you have sold the "E. P. Normanda?"

(Objected to.)

Ans. There was difference of opinion. The "La Normandi" had a large sale.

X 29. Did you have any difficulty in disposing of Ponce's cigars in places where the "La Normandi" were also sold?

Ans. In some places I did, in some I did not.

X 30. They did not conflict much with each other in the sale, did they?

Ans. No, sir.

X 31. Didn't you know some of Mr. Ponce's customers who considered the "E. P." better than the "Normandi?"

(Objected to.)

Ans. I have heard some say so. I couldn't bring them to mind now.

X 32. So far as you know users of these two kinds of
89 cigars knew the difference between the "E. P." and the "Normandi," didn't they?

Ans. They did—the traders did.

X 33. Suppose the case of men who came into Mr. Ponce's store here in Portland to buy a few cigars from day to day, and who had smoked the "E. P." as well as the "Normandi," as far as your observation extends, they knew the difference, didn't they?

Ans. They should know. The "La Normandi" were marked on the ribbon distinctly, while Mr. Ponce's were marked "E. P. Normanda" on a card.

X 34. You think with ordinary observation they would know the difference, would they not?

Ans. Yes.

X 35. Are you a smoker?

Ans. Yes.

X 36. Have you smoked these two kinds?

Ans. Yes.

X 37. Would you have any trouble in telling them apart on going into a store in calling for one or the other, as you might want?

Ans. I would not.

X 38. Do you know if Mr. Ponce's cigars were sold out of the State?

Ans. I know of their being sold in Rochester, N. H., although I never sold them there.

X 39. Referring to Exhibit B, is this the mark included within the oval by which these cigars are known to the trade? I mean the whole thing included within the oval.

(Objected to.)

Ans. I couldn't answer that. I don't understand it myself.

X 40. You see that within the oval are the words "La Normandi" and the letters "M. S.," and my question means: If, when a
90 trader looks to the outside of a box of cigars of this kind, both "La Normandi" and "M. S." are not regarded as the mark by which this brand is known?

(Objected to.)

Ans. I have never heard the "M. S." mentioned in connection with the cigar at all.

X 41. Did you ever see a box of these which didn't have the "M. S." on it?

Ans. I never took notice of it.

X 42. Then you don't know, I suppose?

Ans. No.

X 43. Did you ever see, know, or hear of "Norma" or "Normanda" as a brand of cigars before you worked for Mr. Ponce?

Ans. I have seen 250 boxes, empty, put up on Mr. Ponce's top shelf. I couldn't say what brand was on them, for I never noticed.

X 44. Have you ever seen boxes of cigars, at any time or place, having the mark "La Norma" on them before you worked for Mr. Ponce?

Ans. Yes; I couldn't tell positively when or where. It was too long ago. I have bought them and smoked them.

X 45. Is not it a fact that a good many years ago there was a well-known brand of cigars called "Norma" or "La Norma" pretty extensively sold in this country?

Ans. I could not answer that.

X 46. Did you ever hear of any "Normandi" cigars before you went to work for Mr. Ponce?

Ans. No.

(MEMO.—It is agreed that the following exhibits
Complainants' Exhibit 1—A. H. D., examiner,
" " 2— " " "

Complainants' Exhibit 3—A. H. D., examiner.
Respondent's Exhibit A— " " "
" " B— " " "
" " C— " " "

are considered as formally introduced in evidence in this cause, to be referred to by either party when desired.)

91 Redirect by Mr. HALE:

R. D. 47. To what class did you sell goods, as you have testified, in Eastern Maine?

Ans. To retail dealers.

R. D. 48. Did retail dealers or others to whom you sold, who were unfamiliar to Mr. Ponce, know what the "E. P." stood for?

Ans. I think they did, from the fact that I sold for Mr. Ponce.

R. D. 49. You have said that traders could tell the difference between the brands; so far as you know, would the average smoker that bought notice the difference?

Ans. I think that smokers not familiar with the goods nor Mr. Ponce would not be likely to know the difference between the "E. P. Normanda" and the "La Normandi" brands. They certainly would not unless they took particular notice of them.

R. D. 50. How did the prices of the two brands compare—to the trace?

Ans. The "La Normandi," the Estabrook & Eaton cigar, sold at $65 by the case—$70 for smaller quantities. The "E. P. Normanda," I think, in one case, I sold for $55; usually they sold for $60 per thousand.

R. D. 51. You have spoken of certain boxes upon the upper shelf in Ponce's store. Were or not those empty boxes?

Ans. I couldn't say positively, although if they had not been empty I should not suppose they would have been up there. I think they were taken down while I was in Ponce's employ, and new ones put up there in their place.

Recross-examination:

R. X 52. Do you or not remember whether the word "Normanda" was on those boxes?

92 Ans. I don't know; I never took notice of them to see.

R. X 53. All the dealers to whom you sold knew that you represented Mr. Ponce, did they not?

Ans. They did.

R. X 54. Haven't you heard men ask for "Normanda" cigars when they might come into Mr. Ponce's store in Portland to get a few to smoke?

Ans. I have.

R. X 55. Did or not this frequently occur while you were in his store as his clerk in Portland?

Ans. Yes, sir.

R. X 56. Smokers in a little while learn the names of their favorite cigars, as "Henry Clays," "Partagas," &c., do they not, and call for them by their fancy name, do they not?

Ans. They do.

R. X. 57. After the name "Normanda" was known were or not those cigars generally called for by that name by the smokers?

Ans. They were usually called for, as nearly as I can recollect, as "Ponce's Normanda."

R. X 58. So that they became known and called for just as "Norma," "Normandi," "Henry Clay," "Partaga," "Moonshine," or any other brands were called for by users and smokers, were they not?

Ans. They were.

Redirect by Mr. HALE:

R. R. D. 59. What part of the time during which you were in Ponce's store did men ask for the "Normanda" cigar, as you have just testified?

Ans. The latter part of my being there, after Ponce began the sale of them.

93 R. R. D. 60. Did Ponce Estabrook & Eaton's "Normandi" cigars while you were there?

Ans. He did not.

FRED. W. FOSTER.

Deposition of Edward J. Doyle.

PORTLAND, *October* 9, 1883.

Direct examination by CLARENCE HALE, Esq., counsel for complainants:

Int. 1. What is your name, age, residence, and occupation?

Ans. Edward J. Doyle; age, 24 years; Portland; clerk.

2. What was your occupation in the years 1880 and 1881?

Ans. I began in May, 1880, to work for Mr. Ernesto Ponce, as clerk in his store, in the cigar business, in Portland, and remained in his employ until August, 1881.

3. State, to the best of your recollection and knowledge, whether or not Mr. Ponce, during that time, manufactured or sold or had in his store for sale a brand of cigars called "Normanda" or "E. P. Normanda."

Ans. To the best of my knowledge and recollection he did not manufacture or sell them or have them in his store during that time.

4. Were there or not any old boxes in the upper part of Ponce's store? If yes, state, if you know, where they came from.

Ans. There were some empty boxes in upper part on the finish. I think they were all empty, and, if I remember rightly, they were there when I went there. I don't know whether Mr. Ponce
94 bought them from Mr. Watts, who was there before Ponce, or not. I never saw or noticed what was on the boxes. No goods were sold from them.

5. State, if you know, whether other traders in Portland were sell-

ing the "La Normandi" cigars for which Estabrook and Eaton were agents while you were at Ponce's.

Ans. I don't remember that I heard of anybody in Portland that was selling them, but I had heard of the cigars. Mr. Ponce did not sell them.

Cross-examination by WM. HENRY CLIFFORD, counsel for respondent:

X 6. Do you know how long Mr. Ponce had been in the store when you were employed?

Ans. I do not.

X 7. Can you swear that there were no "Normanda" cigars sold when you went there?

Ans. I don't know that there were any sold there.

X 8. Can you swear that they were not sold there when you first went there?

Ans. Yes, sir.

X 9. How soon after you went there did Ponce begin to sell the "E. P. Normanda?"

Ans. He didn't sell the "Normanda" cigar while I was there.

X 10. Where are you employed now?

Ans. I am not doing anything at present.

X 11. Where have you been recently employed?

Ans. At Morrill's, the hatter, lately deceased.

X 12. When did you first hear of the "E. P. Normandi" cigars yourself?

Ans. I heard of them after I went to work for Mr. Morrill and saw the cigar advertised on Ponce's bulletin board at the door.

95 X 13. They are known as the "E. P. Normanda," are they not?

Ans. Yes, sir.

X 14. Are you a smoker?

Ans. Yes, sir.

X 15. This has got to be a well-known brand of cigars, has it not—the "E. P. Normanda?"

Ans. Yes, sir.

X 16. It is well known from other popular brands by its own name, is it not?

Ans. Yes, sir.

X 17. If you wanted to smoke one of Ponce's "Normanda" cigars what word would you use in calling for it at a cigar store in Portland, for instance?

Ans. "E. P. Normanda."

X 18. If you wanted to buy one of the Estabrook & Eaton "Normandi" cigars how would you call for that?

Ans. "La Normandi."

X 19. Have you or not heard these two kinds of cigars thus called for and bought and sold?

Ans. Yes, sir.

X 20. Frequently?

Ans. Not very frequently, because I am not much of a smoker

myself, and probably there are more of those cigars sold at Mr. Ponce's than at any other store.

Redirect by Mr. HALE:

R. D. 21. Whether the average smoker could distinguish the different brands, as you say you could.

Ans. I don't think they could.

EDWARD J. DOYLE.

96 *Deposition of John James Eaton.*

BOSTON, *Oct.* 16, 1883.

Direct examination by CLARENCE HALE, Esq., counsel for complainants:

Int. 1. What is your name, age, residence, and occupation?

Ans. John James Eaton; 49 years old; Boston, Mass.; tobacco and cigar merchant.

2. How long have you been a cigar merchant, and where?

Ans. 25 years, in Boston; of the firm of Estabrook & Eaton for the last six years.

3. Whether or not you are agent for the cigar called "La Normandi."

Ans. Our said firm of Estabrook & Eaton are and have been since January 1, 1878.

4. Who are the manufacturers and proprietors of that brand?

Ans. M. Stachelberg & Co., of New York city.

5. Are you or not familiar with the method in which cigars of that brand are put up and with the manner in which they have been put up since your acquaintance with that firm?

Ans. I am.

6. Describe that manner.

Ans. They are put up now 250 in a box, twenty-five in a bunch, with a silk ribbon or rather cotton and silk, on which the words "La Normandi" are woven in. They are put up substantially as the box of cigars is put up which is an exhibit in this case, which I procured.

7. Has there been any variation in the manner of putting up since your acquaintance with the brand? If so, state it.

Ans. They have been put up substantially the same, so far as the packing is concerned, so long as I can remember. There has been the addition of our own name on the label on the end of the box outside since we became the agents.

97 8. Has or not said brand of cigars been of uniform excellence since you have had charge of their sale?

Ans. It has—to a greater extent than any cigar I ever knew.

9. In what States has your trade in those cigars extended since your acquaintance with them commenced?

Ans. Maine, New Hampshire, Vermont, Rhode Island, Massachusetts, Connecticut, New York, Illinois, Washington, D. C., Colorado, Florida, California; the above States principally, and some others.

10. Have or not said cigars been furnished to the trade just as they have been furnished you from the manufacturers?

Ans. They have.

11. To what extent have you advertised said brand and under what designation?

Ans. Largely; and designated them as "genuine La Normandi cigar" most of the time; part of the time as "Estabrook & Eaton's genuine Normandi cigars."

12. Has or not trade in said cigars increased during the time of your agency?

Ans. It has, very rapidly.

13. Have you become aware that Ernesto Ponce was manufacturing a cigar similar in character and the method of putting up to your "La Normandi," and similar also in designation? If yes, when did you become so aware?

Ans. I have been told that he and his agents were offering a cigar for sale which they said was the genuine "La Normandi" and were made by him. I have known of his making such cigar a year or more.

14. Have you seen boxes with said brand of Ponce's make; if yes, of what designation?

Ans. I have seen a box of Ponce's make with the name "Normanda" and his name, to the best of my knowledge and belief, on the caution label.

14. Was or not the character of the cigar similar to your
98 brand of "La Normandi," and was or not the method of putting up also similar. If yes, state in what particulars.

Ans. It was; and the method of putting up was similar. They were packed 250 in a box, twenty-five in a bundle; that was all the similarity in the packing.

15. Was there or not any similarity in the ribbons?

Ans. The ribbons were very similar to those that were in use previous to the time the name of the cigar was woven in.

16. Was there any similarity in the character of the cigars; if yes, what?

Ans. The size and shape of the cigars were as nearly identical as they could be.

17. Was or not the appearance of the cigar calculated to deceive the public into supposing that the cigar of said Ponce was the genuine "La Normandi" cigar?

(Objected to.)

Ans. I think it was.

18. How long have you been familiar with the cigar trade and the different brands of cigars for sale in the New England market?

Ans. For from twenty to twenty-five years.

19. During that time have you been familiar with the methods by which cigars are offered to the public and sold?

Ans. I have.

20. Are or not the method of putting up the said "La Normanda" cigars and the said designation upon the boxes of cigars of Ponce's

manufacture calculated to deceive smokers and the public into supposing that the cigars so manufactured and offered for sale by said Ponce are the genuine "La Normandi" cigars?

(Objected to.)

Ans. I think they are.

21. Do you know whether or not the cigars so manufactured
99 and offered for sale by said Ponce are inferior to the cigars called "La Normandi," and whether they are sold at a less price?

Ans. I do not know whether they are inferior or not. I have been told they were sold for a less price.

(Objected to.)

22. Have you or not received complaints from your customers that Ponce's "Normanda" cigars, supposed by them to be the real "La Normandi" cigars, were to be obtained in the market at a less price than your genuine "La Normandi" cigars?

(Objected to.)

Ans. I can't remember personally any such case, though I have an impression that my salesman has told me that such was the fact.

23. Was or not in November, 1882, one F. M. Cotton, of Biddeford, Me., a customer of yours in the purchase of "La Normandi" cigars?

Ans. He was, on or about that time.

24. Please examine paper marked "Complainants' Exhibit —, A. H. D., Ex'r. (said paper is introduced in evidence), and state whether or not, to the best of your knowledge and belief, you received said letter about the time of its date, and is it or not, to the best of your knowledge, in the handwriting of the said Cotton?

Ans. We received the letter, as I suppose, November 10th. I suppose it to be his handwriting, as it has his signature.

25. Up to the time of the beginning of this suit, in all cases where you have known of attempted imitations of said brand of "La Normandi" cigars, have you or not taken measures, under the instructions of Stachelberg & Co., to proceed against and stop all infringements?

Ans. We have notified M. Stachelberg & Co. of the fact when it has come to our knowledge and given them such information as would enable them to stop infringements. We were instructed
100 by them to see counsel and give them such information as would enable them to stop infringements, and we did so in every case when we learned of any attempted imitation of the brand.

26. Is or not your brand of "La Normandi" cigars frequently known among smokers, to your knowledge, as the "Normandi" cigar?

Ans. Yes.

27. Do you know whether or not the "Normanda" cigar offered

for sale by Ponce is frequently known to smokers by the same general designation?

Ans. I do not know whether it is or not?

28. Did you or not, after you knew of the attempted imitation by Ponce of your brand of "La Normandi" cigars, cause him to be notified to stop his infringement?

Ans. I think we caused him to be notified by counsel.

29. Did you or not advertise a general caution during the years 1879 or 1880 against infringers of the brand of "La Normandi" cigars, and was or not that caution in the name of the proprietors of the brand, M. Stachelberg & Co.?

Ans. We did, in their name.

Cross-examination by MM. HENRY CLIFFORD, Esq., counsel for respondent:

X 30. Is not the word "La Normandi," as applied to cigars, an arbitrary or fanciful title?

Ans. I should suppose so.

X 31. Were you acquainted with this brand of cigars when Mr. Bijur made and sold them?

Ans. I was.

X 32. What indicates, at the present time, on the boxes who the present proprietors of the brand are?

Ans. I should suppose the trade-mark, and there is an inside
101 label pasted on the paper inside of the cover, which, I should suppose, would indicate the proprietors, as well as the burnt brand on the bottom giving the factory number.

X 33. What did the letters "M. S." stand for on the top of the box?

A. I never knew.

X 34. Don't you remember that under the word "La Normandi," burnt or stamped on the wood of the box outside, there are also the two letters "M. S.?"

Ans. I don't remember about that.

X 35. Don't you remember that somewhere on the box outside there are stamped or burnt the letters "M. S.?"

A. I think there are on the end of the box characters which were intended for "M. S.," but I never knew whether they were meant for that or not.

X 36. Have you not seen boxes of these cigars having the letters "M. S." in proximity to the words "La Normandi?"

Ans. Not that I can remember.

X 37. Have you not seen boxes of these cigars having the letters "M. S." either over or under or near to the words "La Normandi?"

Ans. Not that I remember, unless that on the end would be considered as under.

X 38. Where is the word "La Normandi" usually stamped on the boxes outside?

Ans. On the top, near the centre.

X 39. Is that where Bijur put the word when he sold them?

Ans. As near as I can remember, yes.

X. 40. Did "La Normandi" denote the proprietorship of this brand when Bijur made them?

Ans. So far as the brand would indicate the proprietorship, it did, so far as I know.

X 41. Does "La Normandi" now indicate the present proprietorship?

Ans. I suppose it does.

102 X 42. How is it possible that "La Normandi" alone could at one time indicate the proprietorship of Ashur Bijur, and then, afterwards, without change, indicate the proprietorship of Stachelberg & Co.?

Ans. I don't know as it is possible, but I suppose it to be from the fact that M. Stachelberg & Co. succeeded to the business of Bijur.

X 43. Disregarding the shield on the boxes of the present proprietors, is there anything except the "M. S." and "La Normandi" stamped upon the boxes outside by way of a trade-mark?

Ans. There is something else on the box; whether a trade-mark or not I don't know. There is the burnt brand on the bottom.

X 44. What do you mean by the burnt brand on the bottom? Describe it.

Ans. I mean the words required by law to be burned on to designate the factory.

X 45. Disregarding those words and the shield, is there anything else by way of a trade-mark except "La Normandi" and the letters "M. S." on the outside of the box?

Ans. Nothing that I remember, except what I have mentioned.

X 46. Did you furnish the boxes that were used as exhibits of the "La Normandi" brand to your counsel, Mr. Hale?

Ans. I suppose my firm did, although I don't know what boxes were used.

X 47. Do you remember whether Bijur put "A. B." or "Asher Bijur" on the outside of his boxes or on the paper or label that was placed on the inside of his boxes?

Ans. I do not.

X 48. When was the binder changed so as to have the word "La Normandi" woven into the fabric?

Ans. I don't remember.

X 49. A year or two ago, or more than that?

103 Ans. I should think less.

X 50. Since this suit was begun?

Ans. I should think it was since this suit begun. It was about that time.

(Adjourned to Wednesday, 10 a. m.)

WEDNESDAY, 10 a. m.

X 51. When did you first put on the boxes the names of Estabrook & Eaton?

Ans. Can't remember the exact date, but should think it was three years ago—as long as that.

X 52. What part of the box did you put it on and how?

Ans. On a label affixed to the end of the box—a lithograph of the firm's signature.

X 53. What did you put that on for?

Ans. To familiarize the trade with our name in connection with the brand of "La Normandi" cigars.

X 54. Since that time have you used it on all of these boxes of "La Normandi" cigars?

Ans. We have.

X 55. In this section of the country have not these "La Normandi" cigars got to be known by the name of Estabrook & Eaton's or got to be associated with the name of your firm?

Ans. They have, so far as we have been able to produce that result.

X 56. Do you know the meaning of the word "Normandi?"

Ans. I do not.

X 57. Has not the association of your firm name increased the sales and enabled you to hold your customers?

Ans. I don't know that that has increased the sales. I
104 don't think that would have increased the sales if the cigars had not been kept up to to the present standard.

X 58. Do you advertise the cigars as made of any particular kind of tobacco or made in any particular way; if so, how?

Ans. We have not.

X 59. The advertisements are subscribed with your firm name, are they not?

Ans. The advertisement of the caution is done in the name of M. Stachelberg & Co., as near as I can remember.

X 60. Do all of your boxes have a card inside with a cut, I believe of the interior of cigar factory, or something of that kind, on top of the contents?

Ans. They have a paper, which I mentioned before in answer to a previous question, which might be called a card, pasted on the paper inside of the box.

X 61. Stachelberg & Co. or Michael Stachelberg printed or stamped on that paper?

Ans. I don't remember that it did.

X 62. I understand you to say that you have never learned what the "M. S." stands for on the outside of the cigar boxes; is that so?

Ans. I never learned that it was "M. S."

X 63. Do you mean that you have never been able to read the letters?

Ans. I mean that they have been made in a fanciful shape, so that they might have been made for a fanciful character, and not for letters.

X 64. Have you ever been able to read them or make them out?

Ans. I have thought that they were possibly meant for "M. S.," and have meant to ask the question, but have always forgotten to do so.

X 65. Then, as I understand it, you have noticed these
105 characters on the boxes and have never been quite able to make them out; is that correct?

Ans. I have never known what they were intended for.

X 66. Did you ever suppose that they were the initials of Michael Stachelberg?

Ans. I have supposed that they might be.

X 67. Then, when you supposed that they might be the initials of Michael Stachelberg that was one of the occasions when you were able to read the letters, was it not?

Ans. I didn't know whether they were letters or not.

X 68. If you didn't know whether they were letters or not how could you suppose them to be initials of a man's name?

Ans. From the fact that they bore a similarity to those letters, which were the initials of Mr. Stachelberg's name.

X. 69. You have been agent of the "La Normandi" cigars since 1878, and as I understand you, you have not been able to decipher with certainty these characters up to the present time; is this correct?

Ans. It is.

X 70. Did you ever hear of the word "Normandi" applied to cigars before Bijur's use of it for that purpose?

Ans. No, sir.

X 71. Did you ever hear the word "Normanda" so applied previous to Mr. Ponce's use of it?

Ans. I have.

X 72. Did you ever hear the word "La Norma" or "Norma" so applied?

Ans. Not to what was represented to be "La Normandi," but I have heard it applied to cigars.

X 73. How long ago?

Ans. I think as long as I have been in the business.

X 74. It is an old brand of cigars, is it not?

Ans. I think it is.

X 75. Were you ever acquainted in the past with a brand of "Normas" put up 250 in a box?

106 Ans. I have seen them.

X 76. Twenty-five in a bunch?

Ans. Yes, sir.

X 77. What kind of a ribbon?

Ans. As near as I can remember, several styles of ribbons.

X 78. Please enumerate the styles.

Ans. Plain yellow striped ribbon, and I think a red ribbon.

X 79. Chocolate stripe or brown?

Ans. I should think it might be termed chocolate.

X 80. Where were they sold?

Ans. Principally from Boston.

X 81. Were they imported or domestic?

Ans. Those put up quarter boxes were domestic. By quarter boxes I mean 250 in a box—*i. e.*, one-quarter of a thousand. The imported, I think, have been put in two or more styles, including 100 and 250 in a box.

X 82. Do you remember what character or symbols the domestic boxes bore in addition to the word "La Norma?"

Ans. I do not.

X 83. Do you remember the picture of a woman?

Ans. I do not.

X 84. Since your connection with the cigar business have you ever seen an imported "Normanda" brand of cigars?

Ans. I never have.

X 85. Have you seen a domestic brand of that name, except Mr. Ponce's?

Ans. I have not seen it. I have seen it advertised, and been told there was one made.

X 86. When did you first learn of it by any means?

Ans. As near as I can remember, as long as twelve or fifteen years ago.

X 87. Where was it advertised?

Ans. In Boston papers.

X 88. Do you remember the merchant or manufacturer?

Ans. I do not. I didn't know the manufacturer.

107 X 89. Did you ever see any of them exhibited?

Ans. Do not remember that I ever did.

X 90. Do you know in what numbers and in what description of boxes they were packed?

Ans: Only from hearsay.

X 91. How were you informed that they were packed?

Ans. As near as I can remember, 250 in a box.

X 92. Did you ever see any of the cigars?

Ans. Not that I remember.

X 93. For how long a time do you think they were advertised or on sale in Boston?

Ans. I only remember of knowing of it but once.

X 94. Do you remember in what paper the advertisement was made?

Ans. I do not.

X 95. How was your attention called to it?

Ans. I think by seeing the advertisement.

X 96. Was this before you became engaged in the cigar business or about the time?

Ans. While I was in the cigar business, but before I had anything to do with the "La Normandis."

X 97. Was it during the early years of your business?

Ans. I had been in business a few years at that time.

X 98. And at this time you had never heard, had you, of the "La Normandi" brand?

Ans. I had.

X 99. Then at this period of twelve or fifteen years ago or so you were aware of the public advertisement of "La Normandi" and "Normanda" as two brands of cigars, were you not?

Ans. I was not. I did not know at that time of the advertisement of the "La Normandi."

X 100. But intelligence of the existence of this brand had in some way reached you?

Ans. It had.

X 101. And as a merchant of cigars you were aware of them both at that time in the manner you have stated, were you?

Ans. I was.

X 102. Do you know where the "Normandas" were manufactured?

Ans. I do not.

X 103. Were they in bunches of twenty-five, as you were informed?

Ans. I don't remember that I was told that they were, but I suppose they were.

X 104. Then they would have to be in the long boxes, would they not—of necessity?

Ans. Not necessarily.

X 105. Did you receive any information as to the character of the boxes.

Ans. I did not.

X 106. And do you in any way know what the shape and size of the boxes were?

Ans. I do not.

X 107. Is it not the usual and customary way of packing 250 cigars, twenty-five in a bunch, to place the bunches side by side, so that they would require a box somewhat longer than wide to contain them?

Ans. It is done in other ways than that.

X 108. And is not this also one of the usual and customary ways?

Ans. It has become usual of late years.

X 109. Have you any estimate in your mind, or can you make any, as to how long these "Normanda" cigars continued in the market at the time of which you are speaking?

Ans. As near as I can remember, but a very short time. I should think less than a year—perhaps not longer than six months.

X 110. Do you know anything about the subsequent history or fate of this brand?

109 Ans. I do not.

X 111. In your experience as a cigar dealer have you ever heard of a foreign brand called "Normanda" or in any way been informed of it previous to the taking of this testimony?

Ans. I never knew that there was a foreign brand of that name.

X 112. Have you ever had any knowledge in any manner of any other domestic "Normanda" brand besides the one you have described and Mr. Ponce's?

Ans. Not that I remember.

X 113. Have you within recent years in any way been informed of a "La Normandi" brand besides complainants'?

Ans. I have not.

X 114. Theirs is the only one you ever knew of that name, is it?

Ans. Only one that I can remember.

X 115. Then, I suppose you thought F. M. Cotton's letter must have referred to Ponce's cigars?

Ans. I didn't know whether it did or not—I thought I would ascertain.

X 116. You knew, did you not, from the price given in that letter, that those cigars could not have been the complainants'—and wouldn't they necessarily have been bought of you or of your agents?

Ans. I did not know that from the price. If they were the genuine "La Normandi" cigars they would necessarily have been bought of us originally. Our agency is at present the head exclusive agency for New England.

X 117. Now, if the cigars to which Cotton refers in his letter had come through your agency, as they must necessarily have done if genuine, they wouldn't have been sold for $65, would they?

Ans. They might have been sold for that.

X 118. In the ordinary course of business, would they have been sold for that?

110 Ans. I should think not.

X 119. I think you said that you instructed the attorney to notify Mr. Ponce of the alleged infringement, did you not?

Ans. I think I did.

X 120. You informed him; then, what brand of cigars, in your judgment, constituted the infringement?

Ans. I informed him that I understood he was imitating the "La Normandi" cigars.

X 121. And you told your attorney what the brand was that you considered an infringement, did you not?

Ans. I don't remember.

X 122. "Norma" is an old name, is it not, as applied to cigars?

Ans. I think "La Norma" is.

X 123. "Normanda" is an old name as applied to cigars, is it not?

Ans. Only to a limited extent and to domestic cigars.

X 124. Packing 250 in a box, 25 in a bunch, is an old method, is it not?

Ans. It is.

X 125. Tying up with a yellow ribbon, with a chocolate or brown stripe in it, is an old method, is it not?

Ans. It is.

Redirect examination by Mr. HALE:

R. D. 126. You have spoken of hearing of the sale of a "Normanda" cigar some years ago; had you or not known for many years before that of the existence of the "La Normandi" brand.

Ans. I had known of it for several years.

R. D. 127. And had it or not been well known to the trade for many years before that?

Ans. It had.

111 R. D. 128. And had it or not been a popular brand, to your knowledge, before that?

Ans. It had, as much so as any domestic cigar that I ever knew.

R. D. 129. And is it not, within your experience and knowledge,

that a popular cigar like the "La Normandi" has been often imitated?

Ans. I think it has in many instances.

R. D. 130. And was or not the "Normanda" cigar, of which you have spoken, put up similarly to the genuine "La Normandi" cigar?

Ans. It was, so far as I heard.

R. D. 131. Was or not that "Normanda" cigar, then, in your opinion as an expert cigar man, an attempted imitation of the genuine "La Normandi" cigar?

Ans. I so considered that it was intended.

R. D. 132. After that cigar had run a few months, as you had heard, do you know whether or not its going out of use was owing to the fact that the proprietors of the "La Normandi" cigar took measures to stop that infringement?

Ans. I do not. I was not then agent for Stachelberg & Co., and consequently do not know.

(Int. and ans. objected to.)

R. D. 133. Have you or not known of any "Normanda" cigar, except such as have been sold since the "La Normandi" cigar has obtained popularity and such as have imitated said "La Normandi" cigar?

Ans. I have not.

R. D. 134. The imported "La Norma" is an old brand long out of use, is it not?

Ans. I have not known of their being imported for a long time.

R. D. 135. You have stated that you have never known a "Normanda" brand of cigars being imported. State whether or
112 not during your familiarity with the cigar trade since 1860 there has been any importation into this market of a "Normanda" cigar, and state your means of knowledge.

Ans. There has not, to my knowledge, and I have known nearly all the brands—I have supposed I knew all—that have been imported into this market. I have attended to the custom-house business and have known what brands were imported in that way—seeing other brands there as well as my own; and I have seen the various price-lists issued in Havana, in which I never saw the "Normanda" brand mentioned, and duplicate invoices, now presumably on file at the custom-house, I think will show that fact. The price-lists are supposed to contain all the brands manufactured in Havana, as they are compiled by the commission merchant for the information of his foreign customers.

JOHN J. EATON.

Attest: A. H. DAVIS, *Examiner.*

COMPLAINANTS' EXHIBIT —. A. H. D., Ex'r.

BIDDEFORD, ME., *Nov.* 9, 1882.

Estabrook & Eaton.

GENTS: Those cigars I have not opened yet. I have been buying some in Portland for 65 per thousand—the "La Normandie." I do not feel like paying 70 when I can get them for 65. Hoping to hear from you,

Yours, F. M. COTTON.

113 *Deposition of Moses Kind, Recalled.*

BOSTON, *Oct.* 17, 1883.

Cross-examination by WM. HENRY CLIFFORD, Esq., counsel for respondent:

X Int. 1. Is not the title "La Normandi" on your cigar boxes accompanied by the letters or the monogram "M. S.?"

Ans. There is a monogram, "M. S.," under the words "La Normandi," in an oval frame, so to speak, branded in. The whole thing is branded in at once by one impression of a die by the box-maker.

X 2. Do you employ a regular box-maker in your business—keep one steadily in employ making boxes for the "La Normandi" cigars?

Ans. Since my connection with the firm there has been but one box-maker that has made these boxes for us.

X 3. And he has the stamp in his possession and burns in one of these impressions upon each box for you, as your agent in this business, does he not?

Ans. Yes, sir.

Redirect examination by Mr. HALE:

R. D. 4. Have you or not had your attention called to a statement that certain cigars called "La Normandi" have been sold to Twitchell, Champlin & Co., Portland, by a certain New York house?

Ans. My attention was called to such a statement.

R. D. 5. In what manner?

Ans. I received a letter from Estabrook & Eaton, in which they informed me that this Portland firm, Twitchell & Champ-
114 lin, had purchased cigars under the brand "La Normandi" from a New York manufacturer named George H. Lowerre.

R. D. 6. State, if you know, whether or not said Lowerre did manufacture or sell some cigars under that name, and whether or not he is still doing so, and state what you did in the premises.

Ans. Mr. Lowerre admitted to me that he had sold some cigars under the brand "La Normandi." I would state that upon receipt of the letter from Estabrook & Eaton informing me of this sale to Twitchell & Champlin I wrote to Mr. Lowerre, informing him of my knowledge of this sale; that we considered the words "La Nor-

mandi" to be our exclusive trade-mark, and that unless he would stop putting cigars under that brand we would sue him for infringement of our rights. I have an impression—I wouldn't like to say distinctly under oath that it is so—that Mr. Lowerre sent me a letter saying that he was not aware that he was infringing on anybody's rights, and would be very careful hereafter not to sell any cigars under that brand. He either wrote this to me or said it verbally when he called at our office. (The bill, dated Aug. 7, 1882, showing the sale of 5,000 "La Normandi" cigars to Twitchell, Champlin & Co. by Pauline Cigar Factory, George H. Lowerre, is exhibited to witness.) Lowerre is no longer selling "La Normandi" cigars. He has gone out of the cigar business. I never knew of his selling "La Normandi" cigars after my notifying him.

7. State whether or not you have known of other imitators and alleged infringers since you have been a member of the firm of M. Stachelberg & Co., and state in detail what you have done in the premises.

Ans. Since my connection with the firm whenever we have heard of any imitation of the brand "La Normandi" being put on the market we at first contented ourselves with writing to the makers of such imitations, cautioning them that they were infringing
115 on our rights, and this always had the effect, to the best of my knowledge, of causing these imitations to disappear. Our agent, in the early part of my connection with the firm, one Henry Nelson, had instructions from us to keep us informed as to these imitations, and one of our reasons of dissatisfaction with his agency was that he was very dilatory in informing us of these things. Since January 1, 1878, Estabrook & Eaton have been our sole agents for the Eastern States for the sale of the "La Normandi" cigars, and have kept us better informed as to the imitations of our brand. They finally became so numerous that we instructed Estabrook & Eaton to retain counsel in Boston, and apply to him to take such steps as he, in his judgment, would deem necessary to stop the infringements.

8. In all cases, when you have known of imitations, have you or not taken steps to stop them?

Ans. We have.

9. When did you first know that Ponce, the respondent, was offering for sale a brand of cigars which you claim to be an infringement of your "La Normandi?"

Ans. Very shortly before the beginning of this suit.

10. Did you ever have any knowledge before the beginning of this suit that Ponce manufactured or claimed to have manufactured "Normanda" cigars about the years 1869 and 1871?

Ans. I never heard of Mr. Ponce until shortly before the beginning of this suit, and I never heard the word "Normanda" applied to a brand of cigars until that time.

11. For how long have you been acquainted with the cigar trade in New York city and with the various brands of cigars made and sold there, and how familiarly and thoroughly have you known that trade?

Ans. I have been in the cigar business since January 1, 1873. I think I am pretty active, and as a fair man of business naturally come in contact with other business men, see goods of their
116 manufacture, hear agents of different manufacturers speak of their brands, and acquire such information as any man of ordinary intelligence naturally acquires in eleven years.

MOSES KIND.

Attest: A. H. DAVIS, *Examiner.*

Deposition of Frank W. Kinsman, Jr.

PORTLAND, *Oct.* 25, 1883.

Direct examination by CLARENCE HALE, Esq., counsel for complainants:

Int. 1. What is your name, age, residence, and occupation?

Ans. Frank W. Kinsman; 25 years; Augusta; dealer in proprietary medicines.

2. In what firm are you a member?

Ans. F. W. Kinsman & Co.

3. When, if ever, did you live in Portland, and in what business and firm were you?

Ans. From the 9th of December, 1881, until the 7th of June, 1883; in the drug business, in the firm of Guppy, Kinsman & Alden.

4. Are you familiar with the brand of "La Normandi" cigars of which Estabrook & Eaton are agents; and, if so, how long have you been so familiar?

Ans. I am familiar and have been familiar with it for six years. I have sold it for five years—sold it to last June.

5. Were you or not familiar with the brands of cigars sold in Portland during the time of your doing business here—from 1881 to June, 1883?

117 Ans. Fairly so.

6. What kind of a cigar was the "La Normandi;" was it or not a favorite with the public?

Ans. It was a favorite with the public, and I considered it a very nice cigar.

7. During the time you did business in Portland did you or not have your attention drawn to the fact that Ernesto Ponce was advertising and selling cigars under a name or names similar to "La Normandi;" if yes, under what names, and what drew your attention to the fact?

Ans. I did. He sold a cigar under the name of "Normanda." People used to come in and call for Ponce's "La Normanda." People used to say that our "Normandis" were ever so much better than Ponce's, and wanted to know if they were not all made by the same firm.

8. To the best of your knowledge, were customers accustomed to purchase Ponce's "Normanda," supposing it to be the brand of "La Normandi" cigars?

Ans. I should say they were.

9. Were you familiar with the brand of cigars called "Normanda," manufactured by Ponce?

Ans. I was.

10. State the resemblances between the "Normanda" cigars and the "Normandi."

Ans. Nearly the same size, color, diameter, and length. They were put in the same sized boxes, the same number in each bunch, and were tied with ribbons of the same size and nearly, if not quite, of the same color.

11. Comparing the quality of the two cigars, which was the better, and in what respect?

Ans. Estabrook & Eaton's "Normandi" was much finer in flavor; in my opinion, made of better stock.

12. How long have you been in the cigar business and familiar with the brands of cigars?

118 Ans. Six years, and familiar with brands of cigars for that time.

13. When did you first know that Ponce was selling "Normanda" cigars?

Ans. In February, 1882.

14. Whether or not, in your opinion, the cigars sold by Ponce, called "Normanda," in their appearance and in the method of their putting up were calculated to deceive the public and smokers into supposing that said cigars were genuine "La Normandi" cigars.

Ans. I should say others than experts would be deceived in them. The majority of smokers would be.

Cross-examination by WM. HENRY CLIFFORD, Esq., counsel for respondent:

X 15. Are not the "Normandi" cigars generally known as Estabrook & Eaton's in this section?

Ans. I should say only among experts, not generally.

X 16. Is not Estabrook & Eaton branded on the boxes?

Ans. They have a sticker with their business card on every box.

X 17. Are there not tablets of some dark material with the words "Estabrook & Eaton's La Normandi" on them sent round to the dealers and to be found in cigar shops and apothecary windows where these cigars are sold?

Ans. We had them and I have seen them in many other places; wooden block letters upon a tablet about eighteen inches long by five wide.

X 18. In the ordinary course of retail dealing of cigars to smokers how do smokers generally make known what they want—for example, is it not the most usual way for a man who is not smoking any particular brand continuously to say, "I want a ten or five cent cigar, medium, mild, or strong," as the case may be?

119 Ans. It is a very common occurrence for parties having a cigar store in a thoroughfare to have a great deal of trade where no particular brand is mentioned. In places where there is

an established trade customers generally call for such or such a brand, giving the name or a part of it.

X 19. In the last branch of your last answer you mean where men are accustomed daily to buy their cigars at the same shop and to ask for those cigars by the name of the brand, do you not?

Ans. Yes.

X 20. These are cases, are they not, where smokers have become acquainted with and fond of a particular brand and therefore call for it?

Ans. Yes.

X 21. Then, again, if a purchaser, having no particular preference for any special brand, asks for a cigar of such and such a quality, of such and such a price, in general terms, does or not the dealer usually recommend some brand of cigar, such as he thinks will meet his wants, and is not the sale made in that case in that way?

Ans. He does, and it is.

X 22. We have now got three classes of buyers for immediate smoking: First, those who name the price and strength of the cigar; second, those who have a preference for some particular brand, which they name; and, third, those who describe the cigar and leave it to the judgment of the seller to suit them. Do you think of any other class of retail buyers besides these three? If so, please describe it.

Ans. I know of no other.

X 22½. That classification pretty accurately describes, does it not, the various classes of buyers that drop into a retail cigar store to buy cigars for immediate smoking?

Ans. It does.

X 23. You class as experts in brands of cigars, do you not, such men as Mr. Schlotterbeck, yourself, and Dr. Dana?

120 Ans. Yes; dealers and ex-dealers.

X 24. Take such men as we have named, and would there be any danger of their buying boxes of "E. P. Normanda" in the belief that they were "Estabrook & Eaton's La Normandi"—*i. e.*, are they the class of men that would be likely to be deceived?

Ans. Not in the regular way of business—*i. e.*, in buying them by the box.

Redirect by Mr. HALE:

R. D. 25. You have referred to the fact that cigars are often known by a part of the full name of the brand by the general smoker in inquiring for a cigar. By what name was the genuine "La Normandi" cigar often known by smokers who came into your shop to buy a cigar of that brand?

Ans. "Normand-er." They would lay down a piece of money and say, I want a Normander cigar.

R. D. 26. Then would or not the cigar of Ponce called "Normanda" be pronounced, in general smokers' talk, precisely like the genuine "La Normandi" cigar?

Ans. It would, by parties not knowing the difference.

R. D. 27. And might or not retail dealers—by this identity of pronunciation—deceive the average smoker and palm off a spurious cigar for a genuine one?

Ans. I should say they could, if so disposed.

R. D. 28. And is there or not great liability of deception to the average smoker in this way?

Ans. There is.

F. W. KINSMAN, JR.

Attest: A. H. DAVIS, *Examiner.*

121 *Deposition of Frank O. Merrill.*

PORTLAND, *Oct.* 26, 1883.

Direct examination by CLARENCE HALE, Esq., counsel for complainants:

Int. 1. State your name, age, residence, and occupation.

Ans. Frank O. Merrill; 33 years old; Portland, Me.; marble business.

2. What was your occupation during the years from 1870 to 1872?

Ans. In 1870 I worked for Mr. Ponce at his store, on Exchange street, as clerk in the sale of cigars. I went to work for him in 1869, the first year that he was on Exchange street. I worked the fall of 1869 and a part of the year 1870. I worked for him twice. In 1871 I worked from New Years till the fall of that year.

3. During the time when you were working for Mr. Ponce, as you have testified, were you familiar with the names of the different brands of cigars sold in his store?

Ans. I was at the time.

4. During that time were cigars sold at Mr. Ponce's store, to the best of your knowledge and belief, by the name of "Normanda" or "E. P. Normanda?"

Ans. No, sir.

Cross-examination by WM. HENRY CLIFFORD, Esq., counsel for respondent:

X 5. Do you now remember any of the brands of cigars that were then sold?

Ans. I do.

X 6 Name some.

122 Ans. Figaro, Conchas, Square Thing—that is about all I remember just now.

X 7. How many different brands should you estimate were in the stock at that time?

Ans. I should think from 12 to 15.

X 8. Do you testify positively that out of the ten or a dozen that you have forgotten you know there was no "Normanda" then?

Ans. I would not, though I never heard of the name until within a few years.

X 9. Mr. Ponce was engaged in the manufacture of cigars in other places or buildings, was he not, at this time?

Ans. He was.

X 10. You did not know, did you, all that was done at those places in the way of manufacture?

Ans. I did not.

X 11. Then you don't swear that Mr. Ponce did not manufacture or sell any "Normanda" cigars, do you, but simply that you do not now remember it?

Ans. I don't remember of ever seeing or hearing or having any call for that cigar.

X 12. With your limited recollection and knowledge of Mr. Ponce's manufacturing, do you or not testify that he did not manufacture or sell any "Normanda" cigars?

Ans. He did not, to my recollection.

X 13. Did you have anything to do with the store on Congress street—tending or selling cigars?

Ans. I did at short times. I would go there and stop an hour or two.

X 14. Had some difficulty with Mr. Ponce, haven't you?

Ans. I don't know in what way. I left him; that's all. We used to have spats every little while.

X 15. Did you or not inform against Mr. Ponce at the internal revenue office?

Ans. I did not.

123 Redirect by Mr. HALE:

R. D. 16. You have been asked and have testified as to the brand "Square Thing." Do you or not remember whether or not Ponce attempted to imitate that brand when you were in his employ?

Ans. He used to sell some of his own manufacture under that name.

FRANK O. MERRILL.

Attest: A. H. DAVIS, *Examiner.*

Deposition of Wendel Kirsch.

PORTLAND, *Oct.* 26, 1883.

Direct examination by CLARENCE HALE, Esq., counsel for complainants:

Int. 1. What is your name, age, residence, and occupation?

Ans. Wendel Kirsch; 42 years old; Portland, Me.; dealer in tobacco, pipes, and cigars.

2. Are you familiar with the different brands of cigars manufactured and sold in Portland?

Ans. Yes; I am familiar with all the prominent and public brands in use here in Portland, and have been since about 1870 or 1871.

3. Are you familiar with cigars sold by Ernesto Ponce, called "Normanda?" If yes, since when have you known said cigars to be manufactured and sold by said Ponce?

Ans. Yes; for about two years, more or less.

4. Did you ever know of Ponce's manufacturing and selling such cigars until about two years ago?

124 Ans. No, sir; it never came to my knowledge.

5. Did you have opportunities for knowing if Ponce manufactured and sold such cigars previous to about two years ago?

Ans. Yes; the same before two years ago, as I have within two years.

6. State whether or not you are familiar with the genuine "La Normandi" cigar of which Estabrook & Eaton are agents.

Ans. Yes; I sold them myself in time past.

7. State whether or not the "Normanda" cigars sold by Ponce resemble the "La Normandi;" and, if yes, in what particulars?

Ans. Yes; in the style of box, the size of the cigars, the way they are put up, their length, the ribbons, and the general appearance.

8. State whether or not the "Normanda" cigars sold by Ponce, in their appearance and in their style of putting up and in the similarity of their name, are calculated to deceive and, in your opinion, do deceive the public and smokers in general into supposing that those cigars are genuine "La Normandi" cigars?

Ans. I should consider it so.

Cross-examination by WM. HENRY CLIFFORD, Esq.:

X 9. Have you sold both kinds?

Ans. No; I never sold any of Ponce's.

X 10. Then, of course, you don't know how people call for Ponce's cigars when they buy them to smoke or how the public and smokers in general call for them?

Ans. No, sir.

X 11. Then, of course, you do not know whether any of the public and smokers in general have ever been deceived in the purchasing of Ponce's cigars, do you?

Ans. I do not.

WENDEL KIRSCH.

Attest: A. H. DAVIS, *Examiner.*

125 *Evidence for Respondent.*

Deposition of Ernesto Ponce.

Direct examination by WILLIAM HENRY CLIFFORD, counsel for respondent.

Int. 1. What is your name, age, residence, and occupation?

Ans. Ernesto Ponce; 41 years old; Portland, Maine; tobacconist and cigar dealer.

2. Do you also furnish stock to manufacturers and have cigars made specially for you?

Ans. Yes.

3. How long have you been connected with the cigar business?

Ans. Twenty-eight years.

4. How long were you engaged in the business in Cuba?

Ans. About seven years.

5. Since that time where have you been?

Ans. Portland, Me.

6. How long have you been in this country?

Ans. About sixteen years.

7. Do you know Manuel Caro and Alonzo Cuétara?

Ans. Yes.

8. How long have you known them?

Ans. About fifteen years.

9. Were they ever employed by you; and, if so, where and how long ago?

Ans. About 12 or 15 years ago, on Congress street, Portland, Me.

10. Was it on Congress street, Portland, or Exchange street?

126 Ans. It was in both places.

11. Did you then manufacture and sell any cigars marked with the word "Normanda?"

Ans. Yes, sir.

12. Where was this word marked and in what kind of letters?

Ans. On the top of the boxes—on the cover in stencilled letters—with ink.

13. How long did you continue to manufacture that brand of cigars at that time?

Ans. For a year or so.

14. Down to about what year?

Ans. Between 1870 or 1871.

15. What time did you go out of business at this time?

Ans. In the year 1875.

16. Did you continue to mark cigars with the word "Normanda" upon the boxes from time to time until 1875, when you went out of business?

Ans. Yes.

17. What did you do with your business in 1875?

Ans. I sold out to Leavitt & Daily.

18. When, if at all, did you go into the cigar business again in Portland?

Ans. About five years afterward—about four and a half.

19. Did you sell your stock to Leavitt & Daily?

Ans. Yes, sir.

20. Were there any of the "Normanda" cigars in the old stock you sold to them; if so, how many?

A. Yes; some; I can't recollect how many.

21. When you went back into business—four or five years afterwards—did you begin to sell the "Normanda" cigars again?

Ans. Yes, sir; a year or a year and a half after the start.

22. Why didn't you begin to deal in them immediately?

Ans. Because I hadn't any leaf tobacco that suited me for these cigars.

127 23. Were these cigars made by yourself, or did you purchase the stock and put it into the hands of a manufacturer?

Ans. I purchased stock and put in into the hands of another man to manufacture for me when he did not himself have stock that

suited me. When he had it I let him manufacture from his own stock.

24. Did you hear the testimony of Foster and Doyle in behalf of the complainants that was given here yesterday?

Ans. I did.

25. They stated, I believe, that no "Normanda" cigars in 1880 or 1881 were made in your shop. Is that correct?

Ans. The cigars were not made in my shop in Portland in 1880 and 1881, but were made for me in Boston.

26. How soon were they sold in the shop in Portland after 1880?

Ans. I sold some in the latter part of 1881 and in 1882 and 1883.

27. How many years ago were you in the cigar business in Cuba?

Ans. Twenty-eight years ago, as clerk; in 1855.

28. Did you make and sell any cigars of the brand of "Normanda" in Cuba?

Ans. Yes, sir.

29. How many years ago?

Ans. About twenty-three years ago; at Havana.

30. Did you know of any one else that made them in Havana or in Cuba?

Ans. My brother and I made them, and other parties made them there before we did.

31. Who were the other parties, and about how long ago did they make them?

Ans. A man by the name of Martinez I knew to have made them. It was a common brand; anybody could make them.

128 32. To whom did you and your brother sell your "Normanda" cigars?

Ans. Sold them everywhere; in the city; to sea captains, and to agents who took them to the United States and to Europe.

33. What other words or letters besides "Normanda" have you marked on your "Normanda" boxes in this country?

Ans. No other letters, except sometimes "E. P." or "E. Ponce."

34. Have you ever sold in this country a box of the "Normanda" cigars without putting on it "E. P." or "E. Ponce?"

Ans. No, sir.

35. What have you printed on the caution label?

Ans. E. Ponce, proprietor.

36. Have you also, sometimes, in addition to "E. Ponce" on the caution label, put "E. P." or "E. Ponce" over, under, or near to the word "Normanda" on the box?

Ans. Yes.

37. What kind of boxes, what shape, and usually holding how many cigars has this word "Normanda" been applied to, so far as you have noticed it?

Ans. To the long box, holding 250 cigars, in ten bunches of 25 cigars each.

38. Does the word "Normanda" in the tobacco trade mean any particular kind or quality of tobacco?

Ans. No, sir.

39. Does it mean any particular kind or grade of cigars?

Ans. No, sir.

40. Take Complainants' Exhibit 1 and look at the registered trade-mark and state what there is in it that shows you what quality of cigars ought to be in that box.

Ans. I can't see what kind of cigars ought to be in that box. That word is the name of a place.

129 41. What word do you refer to?

Ans. "La Normandi."

42. What is the meaning of "Normandi?"

Ans. It is a place in France.

43. Is it the Spanish for the province of Normandy, in France?

Ans. Yes.

44. Translate the words "La Normanda."

Ans. It means a woman that lives in Normandy—the Norman woman.

45. Look at Respondent's Exhibit A and state what that is—I mean whose brand is that and where were the cigars made?

Ans. Made in Philadelphia—La Rosa cigar factory, No. 19.

46. How long have you known those to be in the market?

Ans. Over four years.

47. How many years have you known the brand "La Norma," in Cuba and in this country?

Ans. Ever since I have been in business.

48. Do you know a Mr. Hyams and a Mr. L. P. Benet?

Ans. I know well Mr. Benet, and Mr. Hyams only by sight.

49. Are they cigar manufacturers and dealers?

Ans. They are, both, in Boston—Benet on Doane street and Hyams on Washington street.

50. State if you have expended any money in advertising your "Normanda" cigars and getting them upon the market.

Ans. Yes; considerable.

51. State what name your "Normanda" cigars are called by and how you advertise them, by signs on your shop and otherwise. I mean is it "Normanda" alone or "E. P. Normanda" or "E. Ponce Normanda?"

Ans. I advertise them, by "E. P. Normanda" and by "E. Ponce Normanda."

130 Cross-examination by CLARENCE HALE, Esq., counsel for complainants:

X 52. What was your business previous to 1855?

Ans. Going to school in Spain.

X 53. Where were you born?

Ans. At Santaander, Spain.

X 54. Did you go from school in Spain directly into the cigar business in Cuba?

Ans. I came from Spain to Cuba and went directly into a cigar store as clerk.

X 55. Whose cigar store?

Ans. Mr. Antonio Gonzales, Calle de la Maloja; the number was either 38 or 48 I can't tell which.

X 56. How recently have you been in Havana?

Ans. I was there two years ago last winter.

X 57. Was Gonzales at that time a manufacturer of cigars at the same place?

Ans. Not at the same place. His place was Calle Mon Rique; I can't tell the number.

X 58. Did Gonzales ever sell "Normanda" cigars, to your knowledge?

Ans. Yes.

X 59. When?

Ans. Before my brother and I took up the manufacture of cigars.

(Witness says he has misunderstood, and thought the questions referred to Martinez.)

Gonzales never sold "Normanda" cigars, to my knowledge. I don't know where Gonzales was two years ago. He was said to be in Europe, but his place of business was as I have stated in answer to X 57—that is, his sign was there.

X 60. Was Gonzales familiar with the different brands of cigars sold in Havana?

Ans. I suppose he was; he ought to be.

131 X 61. What was Martinez's name, and what became of him?

Ans. Antonio Martinez. He died about 1858.

X 62. What was your brother's name who manufactured cigars with you, and what has become of him?

Ans. His name was Manuel Ponce. He is in Spain.

X 63. When you were in Havana two years ago was the "Normanda" brand of cigars still manufactured and sold there?

Ans. I couldn't tell.

X 64. How lately have you known that brand to be manufactured and sold in Havana?

Ans. Eighteen years ago—about 1865.

X 65. Who manufactured and sold them in Havana then?

Ans. We—my brother and I—manufactured them, and some others.

X 66. What others?

Ans. I couldn't tell what others.

X 67. Can you name any man now living who manufactured or sold cigars called "Normanda" in Havana?

Ans. I cannot.

X 68. Who worked for yourself and your brother while you were manufacturing said brand of cigars?

Ans. Thirteen or fourteen men. I can't name more than three. One was Jemenes; another was Grazca.

A 69. Do you know their first names and where the men are?

Ans. No.

X 70. Do you know the name and address of any man now living

anywhere who knows that you manufactured "Normanda" cigars in Cuba?

Ans. No.

X 71. During what years did you manufacture "Normanda" cigars in Havana, and where?

Ans. From 1861 to 1865; Calle Maloja; either No. 38 or 48.

132 X 72. Was that brand of cigars generally sold and known to the trade in Havana at that time?

Ans. Not a great deal.

X 73. Give the name and address of any man now living anywhere who was familiar with the brand of "Normanda" cigars in Havana from 1861 to 1865 or at any time since then?

Ans. I cannot name any one.

X 74. Do you know any man now living who knows that you imported "Normanda" cigars into this country from Cuba?

Ans. I do not.

(Adjourned to 10 a. m., Thursday.)

OCTOBER 11, 1883.

X 75. About how many "Normanda" cigars did you and your brother manufacture per year in Cuba?

Ans. Can't tell exactly; forty or fifty thousand a year—that brand.

X 76. To whom did you sell?

Ans. To everybody that came to buy; cannot name any particular person. I can't remember any name.

X 77. When did you first manufacture "Normanda" cigars in America?

Ans. About 1870–'71.

X 78. Where?

Ans. On Congress street, next to the city building, in Portland.

X 79. Who worked for you in such manufacture?

Ans. I had six or seven workmen; Alonso Cuitara, Eman-

133 uel Caro. I can't remember the names of the others; there was a woman and a Chinaman. There was another man by the name of Tuero, who is out West somewhere.

X 80. How many years did you continue the manufacture of those cigars in Portland, and how many per year did you manufacture?

Ans. From a year and a half to two years; about 200 cigars a day through the year, on the average.

X 81. To whom did you sell?

Ans. We sold at retail in the store, and to some customers a bunch at a time.

X 82. Did you sell to any retail traders or to anybody by the quantity?

Ans. I may have done so, but I can't remember the name of anybody to whom I so sold.

X 83. Can you remember the name of anybody now living anywhere to whom you sold bunches of such cigars?

Ans. I couldn't place any name in particular. I sell cigars now to a customer who buys cigars almost every day, whose name I do not know.

X 84. Were the cigars manufactured by you in 1870 and 1871 marked "Normanda" or "E. P. Normanda?"

Ans. Marked "Normanda" on the top of the box, in stencil; then "E. Ponce" on the caution label stuck on the box.

X 85. When did you begin to sell cigars in your store marked "Normanda" or "E. P. Normanda" after you bought out Watts?

Ans. I think in the fall of 1881.

X 86. How many "Normanda" cigars or "E. P. Normanda" cigars did you sell in the year 1881?

Ans. I can't tell you exactly.

X 87. About how many?

Ans. Well, averaging from eight to ten thousand a month for about four or five months of the year 1881.

134 X 88. How many "Normanda" cigars did you sell in the year 1882.

Ans. I can't tell exactly.

X 89. About how many?

Ans. May have sold from 75 to 100 thousand in that year.

X 90. Is that the best estimate you can make of the number that you sold?

Ans. Yes.

X 91. About how many have you sold during the past year?

Ans. May have sold 40,000 this year, perhaps, according to the best estimate I can make.

X 92. As soon as you began to sell them in 1881 did you sell them to retail dealers as well as to individuals in your store, at the corner of Exchange and Middle streets?

Ans. I did.

X 93. Name some of the retail dealers to whom you so sold.

Ans. I can't tell the name of anybody in particular. If you want me to look over my books I will do so.

X 94. Will you look over your books for names of those dealers to whom you sold "Normanda" cigars in 1881 and 1882 and report at this afternoon session?

Ans. I will.

X 95. During the year 1881 did you sell more of said cigars to retail dealers or to customers to whom you sold over your counter in your store?

Ans. I couldn't tell which I sold the most to—retail dealers or to customers over the counter—that year.

X 96. When you began to manufacture "Normanda" cigars in 1881 why did you put the letters "E. P." over the word "Normanda," although you had formerly used only the word "Normanda?"

Ans. To distinguish my cigars from others, because this other manufacturer in Boston manufactured the same name of cigars twenty years ago.

135 X 97. When did you first hear of complainants' brand of "La Normandi" cigars?

Ans. Six years ago, I guess.

X 98. Did you ever sell them at your store?

Ans. No, sir.

X 99. Do you recognize boxes marked "Complainants' Exhibit 2, A. H. D., Ex'r," and "Respondent's Exhibit C, A. H. D., Ex'r," as boxes containing or which have contained your "Normanda" cigars?

Ans. Yes, sir.

X 100. You have spoken of your familiarity with the pronunciation and meaning of the words "La Normandi." State, as near as you can, how these words are pronounced in pure Spanish.

Ans. Lar Normandee-ar.

X 101. Did you know the price of complainants' brand of "La Normandi" cigars in 1881?

Ans. I heard it.

X 102. Have you ever sold, within the past three years, more than one brand of "Normanda" cigars?

Ans. No, sir.

X 103. At what average price during the past three years?

Ans. $60 in small quantities—$55 in large quantities.

X 104. Do you still sell "Normanda" cigars in your store?

Ans. Yes.

X 105. Will you produce a bunch of your "Normanda" cigars, such as you sell in your store, to be made an exhibit in this case?

Ans. I will; but the cigars in Complainants' Exhibit 2 are the same as I now sell.

X 106. Please examine paper marked "Complainants' Exhibit 4, A. H. D., Ex'r," and state if it is your affidavit used on preliminary hearing in this case.

Ans. It is.

136 (The same is offered by complainants and made a part of this deposition.)

X 107. How many "Normanda" cigars did you sell to Leavitt & Daly?

Ans. I know there were some; I can't tell how many.

X 108. About how many—your best estimate.

Ans. It may be a box and a half. The most of the "Normanda" cigars I had were open in the show-case, for retail trade.

X 109. Where are Leavitt & Daly?

Ans. I have heard that Daly is in Colorado; I don't know where. I don't know where Leavitt is.

X 110. Did Leavitt & Daly sell out to Watts?

Ans. Yes.

X 111. When?

Ans. Leavitt & Daly bought me out in '75, and they kept the store about two years and a half and then sold it to H. L. Watts.

X 112. How many "Normanda" cigars were there in the stock when you bought it back from Watts?

Ans. I don't think there were any.

X 113. Do you know whether or not there were any in the stock when Watts bought of Leavitt & Daly?

Ans. I do not know.

X 114. Did Watts sell any "Normanda" cigars?
Ans. I don't know anything about what he sold.

(Adjourned to 3 p. m.)

X 115. Did you examine your books and find whether or not you sold to retail dealers any "Normanda" cigars in 1881? If yes, state with what result.

Ans. Yes; but I do not find any record to retail dealers in 1881. I did sell at retail in my store in 1881.

137 X 116. To whom did you sell in 1882?

Ans. To United States Hotel and to Mr. Hodson, Portland street, in this city, and to a good many others out of town. I can't remember the names without examining my books further.

X 117. Do you produce a bunch of your "Normanda" cigars such as you are now accustomed to sell in your store?

Ans. Yes; I do.

(Said bunch introduced and marked "Complainants' Exhibit 5, A. H. D., Ex'r.")

Redirect examination by WM. HENRY CLIFFORD, Esq., counsel for respondent:

R. D. 118. You were asked in the direct examination why you put "E. P." or "E. Ponce" on the boxes containing your "Normanda" cigars. Please state fully why you always do that.

Ans. I do that because there were one or two other houses in Boston making "Normanda" cigars, and I put "E. P." or "E. Ponce" on the top of the box to distinguish mine from those.

R. D. 119. Have you ever seen any of the Michael Stachelberg cigars—"La Normandi"—where the boxes did not have the letters "M. S." together with "La Normandi?"

Ans. I never saw their make without the "M. S.," but I have seen other houses' cigars of that name—"La Normandi"—without the "M. S."

R. D. 120. What was the name of that house and where were the cigars made and how long ago?

Ans. I can't tell the name of that house; I have lost their card. It was a New York house, and the cigars were sold here in town from a year to a year and a half ago.

R. D. 121. Will you look at the exhibits, Portland Argus, December 20, 1882, and Evening Item, April 1, 1882, copies of which may be made by the examiner, for printing, and which were intro-

138 duced by the complainants at the preliminary hearing, and state if that shows the way in which and the name by which you always advertised this brand of cigars?

Ans. It does.

R. D. 122. Look at the copy of the Lyceum Lorgnette, introduced by the complainants at the same hearing, and state if the advertisement thereon, "Call for E. Ponce's Normanda cigars," is also your usual form of advertising these cigars.

Ans. Yes, sir.

(The respondent also introduces in evidence the following letter, introduced by complainants at the same preliminary hearing:)

R. D. 123.—

BOSTON, *April* 10, 1882.

Mr. E. Ponce.

DEAR SIR: Your advertisement and use of the name of E. Ponce's Normanda cigars is an infringement of our trade-mark, for which we shall hold you accountable unless its use is discontinued at once.

Yours respectfully, ESTABROOK & EATON,
By their attorney, GODFREY MORSE,
Per J. E. L.

Was not that a copy of the notice which you received of the intention of the parties complainant to bring this suit against you?

Ans. It was.

(Respondent now introduces the advertisements—to be copied by the examiner—referred to in int. 121, to be marked, respectively, "Respondent's Exhibits D and E," which are as follows:)

RESPONDENT'S EXHIBIT D. A. H. D., Ex'r.

BEST BARGAINS EVER OFFERED IN THIS CITY!

Anybody intending to make presents, it will pay them to get E. Ponce's prices on meerschaum pipes and smokers' articles in general. The largest and best-selected stock in the city at
139 the lowest prices. There is nothing which would be more acceptable to a gentleman than a box of his celebrated

"E. P." NORMANDA CIGARS

(The best cigar in the market for the money).

I still manufacture them, and shall continue to as their popularity demands.

E. PONCE,

COR. EXCHANGE AND MIDDLE STS.,
OPP. POST OFFICE.

RESPONDENT'S EXHIBIT E. A. H. D., Ex'r.

ADVICE TO SMOKERS!

If you want to smoke the best 10-cent cigar in Portland call for E. Ponce's Normanda. Something new; made of the best long Havana stock.

Canada money and all foreign coins taken for full value in trade.

E. PONCE,

COR. MIDDLE AND EXCHANGE STS.,
AND 87 COMMERCIAL ST., PORTLAND, ME.

12—311

R. D. 124. Please state whether all of the Stachelberg "La Normandi" cigars that you ever saw have or not had under the cover of the box and on top of the contents the cut and words such as are seen in "Respondent's Exhibit B, A. H. D., Ex'r."

Ans. I have some of them without it.

140 Recross-examination by Mr. HALE:

R. X 125. You have said that you have seen other houses' cigars of the name "La Normandi." State whether or not you have seen such for sale in Portland.

Ans. Yes, sir.

R. X 126. When and by whom?

Ans. The man who sold them was named Harris; I don't know his first name nor where he is now; I think it was some time in the fall of 1882.

R. X 127. Did you buy of him any cigars?

Ans. I did not.

R. X 128. Do you know of anybody in Portland who bought of him?

Ans. They said he sold to Twitchell & Champlin; my clerk saw the name "La Normandi" on the boxes of cigars at their store.

R. X 129. What is that clerk's name?

Ans. C. H. Green.

R. X 130. Where is he?

Ans. In my employ—out on the road selling goods.

ERNESTO PONCE.

Attest: A. H. DAVIS, *Examiner.*

COMPLAINANTS' EXHIBIT 4. A. H. D., Ex'r.

I, Ernesto Ponce, being duly sworn, on oath depose and say: I reside in Portland, and am the defendant in this suit. I am a cigar dealer; I also furnish stock and have cigars made especially
141 for me. I have been connected with the business for twenty-two years. I was engaged in the business about seven years in Cuba. Since that time I have been in this country. It has been over fifteen years that I have been in this country. I have been in business in Portland since coming to this country. I know Manual Caro and Alonzo Cuitara; have known them almost fifteen years. They were employed by me at Portland about twelve or thirteen years ago. I was then selling cigars on Exchange street, Portland. I then manufactured and sold, in considerable quantities, cigars marked with the word "Normanda." This word was printed in black letters on the covers of the boxes. I continued to make and sell this brand of cigars until I went out of business, in about 1875. I then sold out to Leavitt & Daly. I resumed the cigar business in Portland in about '79 or '80. There were boxes of "Normanda" cigars in the stock I sold to Daly & Leavitt—quite a large amount—and they were sold by that firm. When I resumed business in '79 or '80 I also took up the sale of the old brand of "Normanda" cigars, and have done so up to the present time. I was connected

with the cigar business in Cuba for several years about 22 or 23 years ago. At that time I made and sold cigars under the brand of "Normanda" which were substantially the same quality of cigars as those I have made under the same mark in this country. The word "Normanda" is a common brand of cigars in the Island of Cuba, and they have for years been exported to this country and sold and used here extensively to my knowledge. "Normanda," in the Spanish language, is the name of a female. While I was in the cigar business in Cuba a brand of cigars called "Normanda" was manufactured and sold by a person whose daughter bore that name, and after the death of this manufacturer my brother, who was a clerk in that establishment, adopted that name for a brand of cigars, and I was associated with him at that time. We made them for about two years. We sold these in Cuba, and also to captains of merchant vessels sailing to this country and Europe, and we sold them also to American and European agents for export.

142 All of the "Normanda" cigars I have made and sold in this country have had Ernesto Ponce or E. Ponce on the caution label, with the statement that they were manufactured by me, and some have also had, in addition to this, the letters "E. P." before or over or at the side of the word "Normanda." I have never used the word "Normandi." I have never received any notice from any persons about the use of the word "Normanda" until last April (1882).

I have bought and sold the "Norma" brand, but never made any myself or ordered them to be made as my brand. This is a common brand and has been in use in this country for many years. The name "La Normandie" has been used by a Philadelphia firm. I have bought these cigars in trade, but never made any and never ordered any made for me. They are on common sale in the market, and can be bought in the market most anywhere. I have seen them in the market for several years.

The term "Normanda" usually applies to a class of cigars put up in long boxes, 250 in a box; but cigars of very different qualities of tobacco have been put up in this country by others, both before and after I began. The word "Normanda" would not describe any special quality of tobacco or grade of cigar, but when united with the manufacturer's name would designate a particular grade and quality. That is the way the word is now used in the trade. I have expended a large sum of money in advertising and introducing my "Ernesto Ponce Normanda" or "E. P. Normanda," and in preserving the good quality of the tobacco and the character of the article. My trade for my special brand is increasing and its reputation improving.

ERNESTO PONCE.

Subscribed and sworn to this 12th day of January, A. D. 1883, before me.

Attest: [L. S.] A. H. DAVIS,
Clerk C. C. U. S., Maine District.

143 *Deposition of Lorenzo P. Benet.*

BOSTON, *October* 16, 1883.

Direct examination by WM. HENRY CLIFFORD, Esq., counsel for respondent:

Int. 1. What is your name, age, residence, and occupation?

Ans. Lorenzo P. Benet; 37 years old; Somerville, Mass.; tobacconist.

2. Where is your place of business and how long have you been engaged in the cigar business?

Ans. 25 Doane street, Boston; in the business eighteen years.

3. Where did you begin your connection with the cigar business?

Ans. My first beginning in the cigar business was as salesman for Mr. Lopez, in East Boston. Soon afterwards I went into business for myself on Harrison avenue, as a manufacturer and as a retail dealer—I mean by that, I wholesaled and retailed.

4. During your connection with the cigar business have you ever known of a brand of cigars called "Normanda" to be on public sale in this country; and, if so, when do you first remember having seen such a brand?

Ans. My answer to that question is this: I myself made that cigar under the name "La Normanda," retailed it and wholesaled it—not on a large scale, for I was a small manufacturer, having only three men. I did this on Harrison avenue in 1869 and 1870.

5. In what kind of boxes were the cigars put up—as to shape, size, &c.?

Ans. 250 in a box—25 in a bunch. I think at that time Mr. Nelson was the agent of the real "La Normandi" cigar.

6. How did you come to adopt the name "La Normanda," and what were your reasons for adopting it?

144 Ans. Because Mr. Nelson tried to sell me some of those cigars and insisted upon my handling that brand, and he charged me 75 a thousand, and I considering it an exhorbitant price, as I could manufacture the cigars for considerably less money, and having had many calls for that cigar—"La Normandi"—which, in my opinion, was a put-up job by Mr. Nelson to oblige me to buy those goods—that is, he sent me the customers—I immediately imitated the brand and used as a proper name the words "La Normanda."

7. State whether you had before this time known or heard of the name "Normanda" as applied to cigars.

Ans. I heard from various parties that there used to be a brand of "La Normanda" imported from Cuba.

8. How many years ago, as nearly as you can state, have you learned of this brand "La Normanda?"

Ans. About the same time that I was manufacturing this brand of my own.

8½. Did you, therefore, use this name and brand because you had heard of it?

(Objected to.)

Ans. No, sir.

9. Will you state how you came to adopt the name "La Normanda?"

Ans. Simply because that I thought that the name "La Normanda" was a proper name belonging to a woman born in Normandy.

10. Did you stamp or in any way place the name "La Normanda" on the outside of your boxes?

Ans. Yes; on the covers.

11. About how long did you continue the sale, wholesale or retail, of this brand?

Ans. During the time I was there in my manufacture—two years or two and a half years.

12. What kind of ribbons were used to tie up the bundles?

Ans. Common cotton ribbons that everybody used to tie
145 this grade of cigars—yellow and brown, chocolate color, with a stripe in the middle, and no name printed on them.

13. Are you familiar with the mark on the boxes of "Normandi" cigars of which Estabrook & Eaton are the agents?

Ans. Somewhat.

14. Please state what words and letters that mark consists of, as far as you have observed it.

Ans. I think it is worded: "La Normandi."

15. Any other letters or words under the words "La Normandi?"

Ans. I have never noticed any. I have not seen any of the brand "La Normandi" lately to examine them closely.

16. Did or not the letters "M. S." always accompany the words "La Normandi" on the boxes?

Ans. I don't recollect, though I might have seen them without noticing them.

17. Are you acquainted with Mr. Ponce's brand, the "E. P. Normanda?"

Ans. Yes, sir.

18. State whether you have noticed on his boxes the fact that the letters "E. P." or the words "E. Ponce" accompany the word "Normanda?"

Ans. Yes, sir.

19. Do you remember any other instances of the use of the brand "Normanda" for cigars than those you have already given an account of? If so, please state them.

Ans. I have not under the same word; but I have under a different word very similar—namely, "La Normandy," and have heard the name of the parties that have made them for years past.

20. State how long ago those were made.

(Objected to.)

Ans. I can't tell you as to the number of years. The brother of the party who made them told me that he had made them for several years.

146 21. What was the party's name and where were they said to have been made?

(Objected to.)

Ans. Mr. Hyams, on Washington street, Boston, was the party. I was not told where they were manufactured, but I suppose in Boston, because Mr. Hyams is in business here in Boston. This was told me in presence of my son.

Cross-examination by CLARENCE HALE, counsel for complainants:

X 22. Then you know nothing personally, of your own knowledge, of the alleged manufacture of said cigars by Hyams?

Ans. No, sir.

X 23. If he did manufacture, as you have heard, it was another imitation, clearly, of the real "La Normandi" cigars of which you have spoken, was it not?

Ans. I should judge it was.

X 24. You never saw a "Normanda" cigar imported, did you?

Ans. No, sir.

X 25. And you know nothing, of your own knowledge, of any such importation?

Ans. I know this much: That when I sold my brands to my customers they remarked to me about their being an imitation of the imported article, such as they used to buy before the war.

X 26. Do you know what brand they referred to—whether or not it was the "La Norma" brand?

Ans. No; the remark was about my brand, the "La Normanda," and some of my customers remarked to me also, asking why I didn't put the picture of the woman on my boxes also, but as I didn't know that the brand they referred to—the "La Normanda"—had a picture I didn't put any on mine.

147 X 27. Can you produce any man now who knows of his own knowledge that "Normanda" cigars were imported?

Ans. I don't know as I can—it was so many years ago.

X 28. The cigars that you manufactured under the name of "La Normanda," as you have testified, is the first "Normanda" cigar that you have known about personally, is it not?

Ans. The only one—*i. e.*, at the time that I was manufacturing.

X 29. You thought you could imitate real "La Normandi" cigars, as you have testified, without any infringement of that brand, did you not?

Ans. Yes, sir, and I think I can do it now.

X 30. Who was Nelson the agent of?

Ans. I don't recollect; he was agent for the "La Normandi" cigars.

X 31. Was M. Stachelberg, of New York, manufacturer of that brand?

Ans. I don't know who made them at that time.

X 32. Are M. Stachelberg & Co., of New York, the present manufacturers of the "La Normandi" cigars?

Ans. I have heard that they were.

X 33. Have you had any dealings with or bought any goods of

said Stachelberg & Co. or of said Stachelberg before the firm was formed?

Ans. Never had any occasion, before or afterwards.

X 34. After being reminded of a transaction in one of the years from 1874 to 1876, can you state whether you did or not have any dealings with that house?

Ans. Mr. Kind is positive that I did buy one or two little bills of that house through Mr. Sidney Lester; therefore, I admit that it may be possible that I did, but I do not remember it.

X 35. Did you ever deal in the real "La Normandi" cigars manufactured by said Stachelberg?

Ans. I have used one or two boxes as samples.

148 X 36. Was not that brand popularly known by smokers as the "Normandi" cigar?

Ans. It was to a certain extent thoroughly known by some customers, as the "Normanda" cigar is a five-inch cigar, and many a time I have sold a Concha-size cigar—four inch—for "Normandi," and customers did not know the difference, and also many a customer that I come in contact with hesitates about the name; some call it "Normandi," some "Normanda," and some "Norma," as they were not sure of the real name.

X 37. Didn't smokers sometimes, inquiring for the "La Normandi" cigar, ask simply for a "Normandi" cigar?

Ans. Sometimes they would say, Give me a "Normandi." I don't know what they meant.

X 38. And they would ask for your "Normanda" cigar, sometimes in the same way, would they not?

Ans. Never asked specially for my brand, because I had some customers to whom I was selling my "Normandas" who wanted to know what was the reason that when they went to Estabrook & Eaton and bought the genuine "Normandi" there it didn't taste so good as my own, and then I explained that mine were made by myself, and then they seemed to be in doubt about the real name of the real "Normandi," and wished me to explain to them what was the real name—"Normandi," "Normanda," or "Norma," or what.

X 39. Do you know whether or not Ponce's "Normanda" cigars are spoken of in the same general way that you have described—simply as "Normanda" cigars—by smokers?

Ans. I do not know, as I am in Boston and he is in Portland. All I know is that his brand of "Normanda" gives very good satisfaction.

X 40. Did you put up your "Normanda" cigars in a similar way to the genuine "Normandi" cigars—in respect to the number in a box, the kind of ribbons, and shape of cigars?

Ans. I have; all except the shape and size. My cigars are a good deal larger.

149 X 41. Ponce's cigars are similar in shape and size to the genuine "La Normandi" cigars, are they not?

Ans. Not the ones that I have made for him. The boxes were larger and the cigars were larger.

X 42. Then you have made "Normanda" cigars for Ponce?

Ans. I have, and will continue to make them for him or anybody else under the same brand.

X 43. And are you still making the same for him?

Ans. Not at present, as I have had no orders from him; but would immediately make them as soon as he gives me the order, as under that name I don't consider that I am infringing on anybody's brand, as I can prove that the word "La Normanda" is a proper name, and not a registered or copyrighted name by anybody.

(Objected to as irresponsive.)

X 44. When did you begin to manufacture the same for Ponce?

Ans. About a year ago.

X 45. How were the boxes labelled in which those cigars were put, if you know?

Ans. There were no labels. They were branded on top "E. P. Normanda"—the initials and "Normanda" underneath them in large letters.

LORENZO P. BENET.

Attest: A. H. DAVIS, *Examiner.*

150 *Deposition of Manuel Caro.*

BOSTON, *Oct.* 16, 1883.

Direct examination by WM. HENRY CLIFFORD, counsel for respondent:

Int. 1. State your name, age, residence, and occupation.

Ans. Manuel Caro; 36 years old; Chelsea, Mass.; cigar manufacturing.

2. Did you work for Mr. Ponce in Portland in 1869?

Ans. Yes; I worked for him, making cigars.

3. Do you remember the name of the street where the store was?

Ans. Congress street.

4. Did he manufacture and sell a brand called "E. P. Normanda" or "Normanda" at that time?

Ans. I made, sometimes, cigars of the brand "Normanda," as he called them.

5. What, if anything, was stamped on the boxes in which those cigars were packed?

Ans. I do not recollect noticing any of the boxes; I only was making cigars.

6. You made a statement some time ago in this case, didn't you?

Ans. Yes.

7. Do you remember the month in 1869 that you went to work?

Ans. I think it was in March.

Cross-examination by CLARENCE HALE, counsel for complainants:

X 8. Will you make your statement formerly made in this case a part of this deposition?

151 Ans. I will. Respondent's counsel may see it marked and annexed.

(The same is annexed and marked "Complainants' Exhibit 5, A. H. D., Ex'r.")

X 9. How long have you known Ernesto Ponce?

Ans. Since 1869.

X 10. How many years during that time do you know him to have manufactured a cigar called "Normanda?"

Ans. The first time I heard it named as a brand of cigars was when I worked for him in 1869. I was away in 1870, and do not know whether he made them or not. I worked for him in 1871 again, and he was making them then. I don't know anything about it since 1871.

X 11. You had never heard of the brand before 1869?

Ans. No, sir.

X 12. How long before that had you heard of the "La Normandi" cigar now sold by Estabrook & Eaton?

Ans. I did not know that brand then.

X 13. When did you first hear of the "La Normandi" brand of cigars?

Ans. Three or four years ago.

X 14. Is not Ponce's "Normanda" cigar made similar and put up similar to the "La Normandi" cigar of Estabrook & Eaton?

Ans. I think the ribbons are of the same color, but the cigar is shorter.

X 15. Were not the "Normanda" cigars made by you for Ponce made and put up similar to the "Normandi" cigar now sold by Estabrook & Eaton?

Ans. I have made some cigars for Mr. Ponce and put them up similar to the cigars of Estabrook & Eaton, as to the number of cigars in a box, the color of the ribbons, but not in the size of the cigars.

X 16. Have you not said you made them in that way in order to imitate the "Normandi" cigars?

152 Ans. No, sir.

X 17. Did you not make them in that way so that they could be sold on the reputation of the "La Normandi" cigars?

Ans. No, sir, because I only sold them to Mr. E. Ponce.

X 18. Then could not Ponce sell them on the reputation of the "La Normandi?"

Ans. I don't think so, because Mr. Ponce used his name on the top of the box.

X 19. How was the "La Normandi" marked on the top of the box?

Ans. I never saw one box.

X 20. Where was your factory when you were manufacturing the cigars for Ponce?

Ans. 27 Central Wharf, Boston.

X 21. Who is there now in Boston who knows that you made "Normanda" cigars, as you have stated, in 1869 or 1871?

Ans. Alonzo Cuetara.

X 22. Who else?

Ans. I don't know any other in Boston.

X 23. Who else anywhere?

Ans. I don't know any other person.

X 24. How many cigar-makers did Ponce employ at that time?

Ans. Three.

X 25. How many "Normanda" cigars did you make for Mr. Ponce in 1869?

Ans. I do not remember.

X 26. About how many?

Ans. I suppose about two or three thousand.

X 27. How many in 1871?

Ans. Very few, because I staid a very short time.

X 28. How long?

Ans. Three or four months.

X 29. How many of those cigars did you make per month?

Ans. Some months not any at all and some months five or six hundred.

153 X 30. In 1869 and 1871, when you made cigars, as you have testified, did you ship them direct to Mr. Ponce, in Portland?

Ans. I was in Portland.

X 31. Where did you move from Portland in 1871?

Ans. To Boston.

X 32. Have you been a cigar-maker ever since?

Ans. Until 1875.

X 33. Have you not stated that Ponce told you that the word "Normanda" would help the sale of his cigars because it was like the word "Normandi?"

(Objected to.)

Ans. No; Mr. Ponce told me to use good stock and he could sell a good many "Normanda."

X 34. Do you remember telling Ponce that he had a right to imitate the word "Normandi?"

(Objected to.)

Ans. I do not.

X 35. Did you make and put up the cigars made by you in the manner as ordered by Mr. Ponce?

Ans. Yes.

X 36. How many in a box?

Ans. What I manufactured for him 250.

X 37. What kind of ribbons were tied around the bunches?

Ans. Yellow and light brown.

X 38. Do you know how long Ponce had been in Portland at that time?

Ans. I think five or six years before I began to work for him.

MANUEL CARO.

Attest: A. H. DAVIS, *Examiner*.

154 COMPLAINANTS' EXHIBIT 5. A. H. D., Examiner.

I, Manuel Caro, being duly sworn, depose and say that I am a manufacturer of cigars, doing business in Boston, Massachusetts; that I now reside in Chelsea, Massachusetts; that I am acquainted with Ernesto Ponce, manufacturer of cigars at Portland, Maine; that I was in the employ of said Ernesto Ponce in Portland, Maine, in the manufacture of cigars in 1869, commencing my employment about February, 1869, and continued in his said employ until 1871; that said Ponce was manufacturing a brand of cigars called "Normanda," and said brand was stamped upon the boxes sold by him when I first began to work for him, and continued to do so during the time I was in his employ, and that I was employed myself during that time in making that brand of cigars for him.

MANUEL CARO.

DIST. OF MASS., *ss:*

Subscribed and sworn to by the above Manuel Caro this 10th day of January, 1883, before me—

[L. S.] WINSLOW WARREN,

Commissioner of U. S. Circuit Court for Dist. of Mass.

Deposition of Solomon M. Hyams.

BOSTON, *Oct.* 17, 1883.

Direct examination by WM. HENRY CLIFFORD, counsel for respondent:

Int. 1. What is your name, age, residence, and occupation?

155 Ans. Solomon M. Hyams, of the firm of Hyams Brothers; 50 years old; Boston, Mass.; cigar manufacturer and tobacconist; place of business, 716 Washington street.

2. How long have you been connected in any way with the cigar and tobacco business or either?

Ans. Since I was 14 years of age.

3. Were you ever connected with the business in New York; and, if so, how many years ago?

Ans. Yes; 30 years ago.

4. At that time what was the nature of your connection with the cigar business?

Ans. I was a journeyman cigar-maker.

5. Will you please give the place where you were employed?

Ans. I worked for Bijur Brothers, Schubarts & Hoffman, and for a man who was called "Havana Cohen."

6. At this time—about 30 years ago—were you or not acquainted with a brand of cigars called "Normanda?"

Ans. I was—a brand called "La Normanda."

7. In what market were they sold?

Ans. In the city of New York.

8. Please state whether the sale was a limited or an extensive one.

Ans. I should say that it was quite an extensive one, for the reason

that I used to work in the shop in the daytime and work at home nights for myself, and buy these boxes from the parties that used them, and refilled them for myself and sold them as "La Normanda" cigars.

9. For how long a time, as nearly as you can remember, were you thus acquainted with this brand "La Normanda?"

Ans. Ever since.

10. The last syllable of the word was da?

Ans. Yes, sir.

11. How many cigars were usually put in a box, how many
156 in a bunch, and with what kind of band were the bunches tied?

Ans. 250 in a box, 25 in a bunch; tied with cotton tape, yellow, with chocolate or brown center; some had a lighter color or shade of brown.

12. How long was the cigar?

Ans. Five-inch cigar.

13. Are you acquainted with a brand of cigars in existence at present called "La Normandi," sold by Estabrook & Eaton in Boston?

Ans. I am.

14. What was the difference between those "La Normanda" cigars—their size, manner of packing, and the general shape of the boxes—and this recent cigar of Eastabrook & Eaton's?

Ans. The size of the cigar was about the same; the box, of course, would be the same; the only difference that I know was that the word "La Normandi" is written or stamped on the ribbon or band, and possibly the initials of the parties making them were stamped on the box; otherwise, to all appearance, they were the same.

15. The Estabrook & Eaton cigars have the letters "M. S." branded on the outside of the box, do they not?

Ans. I am not positive.

16. Can you state who was the manufacturer of this "La Normanda" brand at the time of which you speak?

Ans. I cannot, for the reason that manufacturers at that time did not put their names on the boxes. Now they put their names on the boxes, and it is brought to our attention.

17. For whom were you working when you made these cigars under this name and packed them in this style on your own account?

Ans. For Bijur.

18. How long did you remain in New York after the time of which you have spoken?

Ans. About two years.

157 19. Did these "La Normanda" cigars continue in the market during that time until you left?

Ans. Yes; and have ever since.

20. They were not made by Mr. Bijur during the time you worked for him, were they?

Ans. No, sir; I don't think he was making either kind at that time.

21. I suppose you at that time bought the boxes that had once been used, because you could get them cheaper than new ones?

Ans. Yes.

22. Please give an estimate—not, of course, an accurate one—of the amount that you yourself made on your own account having "La Normanda" stamped on them.

Ans. I made about 3,000 a month for about eighteen months.

23. Did you ever know of an imported brand of "Normanda" cigars or "La Normanda?"

Ans. I never saw or heard of any.

24. Did you move from New York to Boston?

Ans. No; I have been in Boston since 1867.

25. Please state if you have from time to time since the thirty years ago or so when you were in New York made and sold any of this brand of "La Normanda" in your business.

Ans. I have.

26. Then you were in New York about the years '53 and '54?

Ans. Between those years.

27. Please state in a general way, as nearly as you can, how commonly you saw the "La Normanda" in places where they were usually sold.

Ans. In quite a number of places.

28. Do you remember whether the word was branded into the wood or stamped upon a paper or label?

Ans. The words were branded.

29. Have you any box or cover in your possession at present that has "La Normanda" upon it?

158 Ans. I think I have.

30. Will you take the trouble to look when you return to your store and inform me?

Ans. I will.

Cross-examination by Mr. HALE:

X 31. You have been pretty well acquainted, have not you, with the different brands of cigars imported into our markets since 1860?

Ans. Well, I can't say that I am very well posted on imported cigars. I don't do much in that line.

X 32. What year did you move to Boston?

Ans. I came to Boston in 1867, but not from New York.

X 33. What year did you move from New York?

Ans. About the latter part of 1855.

X 34. During what years, in New York, did you manufacture cigars called "La Normanda?"

Ans. Between 1853 and 1854.

X 35. Only one year?

Ans. No; I do not say only one year. I might have made them clear into 1855, when I left.

X 36. When did you begin to make them?

Ans. Some time in the beginning of 1853, and made them for about 18 months.

X 37. How many did you make the first month?

Ans. I couldn't positively tell you—about 3,000 a month I made during the time I made them.

X 38. Where did you make them?

Ans. I had a room in Nassau street.

X 39. What number?

Ans. I don't remember now.

X 40. In what part of the street and in what kind of a building?

159 Ans. It was on the right hand of Nassau street, going down. I had a cousin there in that building—a wood engraver. Just about that time he left for Australia, and I took his room.

X 41. How many rooms, and in what part of the building?

Ans. Two very small rooms on the third floor.

X 42. Who owned the building?

Ans. I couldn't tell you.

X 43. Of whom did you rent?

Ans. I rented from some colored folks that had that flight. I paid them the rent.

X 44. What were their names?

Ans. I couldn't tell you, sir.

X 45. Didn't you know at the time?

Ans. Yes, but I have forgotten now.

X 46. Between what streets was the building situated?

Ans. I couldn't tell you. I don't remember. I am not well enough acquainted.

X 47. In what portion of the street?

Ans. Not very far down, going from Chatham street.

X 48. Did you live there all the time you were in New York?

Ans. Yes; I lodged there; had my rooms there for working and sleeping.

X 49. Was it near Beekman street or Fulton street?

Ans. I think it was in the vicinity of Beekman street.

X 50. You were then about 20 years old, were you?

Ans. Just about.

X 51. Did any one assist you in manufacturing the "La Normanda" cigar?

Ans. No, sir.

X 52. You manufactured 3,000 cigars a month alone?

Ans. About that. I speak of an average. I worked evenings and Sundays.

X 53. Of how many different manufacturers did you purchase boxes labelled "La Normanda?"

160 Ans. I didn't purchase from any manufacturers; I purchased them from saloons and luncheon places.

X 54. From how many?

Ans. From several. I couldn't give you any number.

X 55. As many as ten?

Ans. I couldn't tell you.

X 56. About how many?

Ans. From several; it may have been five or six, it may have been more.

X 57. What were some of their names?

Ans. I couldn't give you their names. I don't remember. If I were to go into two or three places to buy empty cigar boxes it wouldn't be necessary for me to know their names.

X 58. About how many cigar boxes with the name of "La Normanda" on them did you buy in those 18 months?

Ans. Well, I manufactured about 3,000 cigars a month, which would be in the neighborhood of 10 or 12 boxes a month.

X 59. Can't you give the name of any one man of whom you bought a box during those 18 months?

Ans. I cannot.

X 60. Can't you give me the name and address of any one from whom you purchased a box or who knew of your manufacturing in the way you have described?

Ans. I cannot.

X 61. In what locality did you purchase the boxes?

Ans. Different localities.

X 62. What one?

Ans. I couldn't name any particular one.

X 63. Who made the boxes?

Ans. Indeed, I couldn't tell you.

X 64. Did you work for Bijur all the time you were engaged in this manufacture of "La Normanda?"

Ans. I did not.

X 65. What part of the time?

161 Ans. I don't exactly remember; perhaps six or seven months.

(Adjourned.)

THURSDAY, *October* 18, 1883.

X 66. For whom else did you work?

Ans. I worked a short time for Shubarts & Hoffman; a short time for "Havana Cohen," and for some others.

X 67. Did any of the men for whom you worked know that you were making "La Normanda" cigars on your own account?

Ans. No; I can't say that they did. They knew that I was working at home, making cigars, but did not know what cigar I was making. It was a very common thing to do so at that time.

X 68. Was this your first experience in making cigars on your own account?

Ans. It was; as I had only just previously commenced working as a journeyman.

X 69. How many hours a day did you work for your employers?

Ans. On an average, from about 8 a. m. to 6 p. m., with an hour out at noon.

X 70. How many cigars a day did you make, on an average?

A. Well, I couldn't well give you an average; from, say four to five hundred; some days perhaps not more than three hundred. I have made as many as eight hundred in a day.

X 71. Were the manufacturers you have mentioned the leading cigar manufacturers of New York at that time?

Ans. I don't know exactly. I think Schubart & Hoffman were leading manufacturers at that time.

162 X 72. Did you or not ever work for M. H. Levin?

Ans. No, sir.

X 73. Were you acquainted with the leading brands of cigars made by the manufacturers of New York at that time?

Ans. I can't say that I knew them all. I knew that "La Normanda" was sold a good deal, and "La Noma" and the "Londres." I didn't go around among the trade enough to know all the brands.

X 74. What leading manufacturer made and sold "La Normanda?"

Ans. I don't know.

X 75. Did you at the time?

Ans. No; I can't say that I know specially who made them. The cigar was very common at the time.

X 76. Was it customary for more than one manufacturer to make any one given brand of cigars?

Ans. Yes; the same as it is at present.

X 77. State, if you know, how many manufacturers made the "La Normanda" at that time.

Ans. I do not.

X 78. Can you give the name and address of any man who knows the name of any manufacturer of the "La Normanda" brand at that time or dealer in said brand?

Ans. I cannot; and there are very few persons that could after 30 years.

X 79. Who were the leading cigar-box makers at that time?

Ans. I really do not know, never having had occasion to inquire. I never bought any new boxes, consequently it didn't interest me to know who were the box-makers.

X 80. Did the boxes you bought have a label on or about them anywhere? I refer to a paper label, lithograph, or anything of that kind.

Ans. I really don't remember. I think, however, that on some of the boxes there was a circular label inside of the

163 cover. I wouldn't say positively, but I am inclined to think there was.

X 81. Was the same label on all of the boxes? If not, can you describe in detail any other labels that were on any boxes that you bought?

Ans. I don't remember.

X 81. Cannot you give the name of some one now living in New York who would be likely know of the manufacture and sale of "La Normanda" cigars in New York at the time of which you speak?

Ans. I cannot; but I presume there are plenty there who can.

X 83. Who, for one?

Ans. I don't know.

X 84. To what class of trade did you sell the brand of cigars you made?

Ans. At saloons and eating-houses. I boarded with a Mr. Coblenzer; I think his house was the City Hall Hotel, or some such name, and I used to sell him cigars for my board.

X 85. Name all the customers to whom you sold that brand of cigars, at that time, so far as you can remember them.

Ans. I can't remember any—because I sold them one or two boxes at a time and got my money for them; I don't remember the names now.

X 86. Can't you give the name and address of any person now living who knows that you were selling "La Normanda" cigars in New York at the time of which you testify?

Ans. I cannot, for I have not lived in New York for twenty-eight years.

X 87. Where and to what place did you go from New York, and into what business did you go?

Ans. I went from New York to Baltimore, and remained in the cigar business there and have been in the cigar business ever since.

X 88. Where, and how many years in each place?

164 Ans. I was probably eight years in Baltimore; about a year in Norfolk, Va.; after the war broke out I removed to Philadelphia; was there between one and two years, and from Philadelphia removed to Boston, and have been here since the early part of 1867.

X 89. Where were you born?

Ans. I was born in London, England.

X 90. Did you sell "La Normanda" cigars in Baltimore, Philadelphia, Norfolk, and do you continue to sell them in Boston?

Ans. Not in Baltimore, Norfolk, nor Philadelphia, but I have in Boston.

X 91. During what years in Boston and to what extent, about?

Ans. I have made a great many of them here; I couldn't say how many. I commenced to make them here in 1870 and have made them nearly all the time since then. I have made 100,000, to put a small figure upon it, in Boston since 1870. I have made the same cigar, but the name has been spelled in two or three different ways to suit my customers, as "La Normanda," "La Normande," and am now making "La Normandie."

X 92. To what class of trade are your sales made?

Ans. I have made them for jobbers and the public generally.

X 93. Who made your cigar boxes, and has made them, for the past ten years?

Ans. Page & Co., of Cambridge, made the "La Normanda" boxes, and Streider, of this city, makes my boxes now.

X 94. Were your sales in New York made to different saloons; if yes, to how many?

Ans. Yes; to various saloons; I couldn't give the number now.

X 95. Were there saloons to which you were accustomed to make sales?

Ans. Yes; there were such.

165 X 96. In what locality were they, and how many can you remember?

Ans. Five or six—on the Bowery and other places.

X 97. How many in the Bowery?

Ans. I couldn't tell you.

X 98. Can you tell the names of any in the Bowery?

Ans. I cannot.

X 99. Did you sell to "The Volks Garten?"

Ans. No.

X 100. Can you recall the name of any saloon in the Bowery or of any saloon-keeper in the Bowery at that time?

Ans. I cannot.

X 101. Were you not accustomed to go into any such saloons from time to time for purposes of refreshment?

Ans. Occasionally, when I was thirsty, and also to try to sell a box of "La Normanda" cigars.

X 102. Upon applying your recollection to that part of your life cannot you remember some person now living who knows that you were at that time selling "La Normanda" cigars?

Ans. I canmot. I wish to add that the answers to the above questions in this deposition have been given upon short notice after the lapse of thirty years.

X 103. This is the second day you have been under examination, is it not?

Ans. It is.

SOLOMON M. HYAMS.

Attest: A. H. DAVIS, *Examiner.*

166 *Deposition of Solomon Mathias.*

Direct examination by WM. HENRY CLIFFORD, Esq., counsel for respondent:

Int. 1. State your name, age, residence, and occupation.

Ans. Solomon Mathias; 50 years old; Portland, Maine; tailor.

2. Were you ever in the tobacco or cigar business; if so, how long ago did you begin, where, with whom, and about how long did you continue in the business?

Ans. I was. My first recollection is tobacco. My father carried on the business in a town called Krotoschien, in Germany. I was with my father in the business until I came to America, in 1848 or 1849.

3. Were you ever in the tobacco business in this country?

Ans. Yes, sir.

4. Please state where, when, and for how long a time.

Ans. In Portsmouth, N. H., and in Saco and Portland, Me. I was in Portsmouth, I think, about 1852 or 1853; in Saco about two years later, staying there about two years, and then I came to Portland, where I was in the cigar business until about sixteen years ago.

5. While you were in the business in Portsmouth, Saco, and Portland did you know of or deal in a brand of cigars called "La Noma?"

Ans. I did.

6. Please state about the size of the cigar, the size of the boxes, the number in a box, the number in a bunch, and how they were tied up.

Ans. The cigar was about five inches long. The box was of the size of Exhibit 1. There were ten bunches of twenty-five cigars each in a box, and the bunches were tied with one ribbon in the middle.

167 7. Please state the colors of the ribbon.

Ans. A blue ribbon with a chocolate stripe in the middle.

8. Were the words "La Norma" stamped on the boxes?

Ans. They were.

9. You dealt in those while in Portsmouth?

Ans. Yes, but not in Saco or Portland.

10. Have you ever heard, in your cigar business at Portsmouth, or Saco, or Portland, of a brand called "Normanda?"

Ans. Yes.

11. Did you ever see any of the cigars or any of the boxes?

Ans. No; I never did.

12. Please state how frequently or commonly you have heard of that word as a cigar brand?

Ans. I haven't heard anything of it for twenty-five years until recently.

13. Twenty or twenty-five years ago, in your business, did you not hear more or less frequently that word "Normanda," in a general and common sort of a way, as a cigar brand?

Ans. I did.

Cross-examination by Mr. HALE:

X 14. Where?

Ans. In Saco. I can't say very well, because I was traveling all over the country.

X 15. Do you remember of hearing it while you were in Portsmouth?

Ans. I don't particularly remember; I might have heard it.

X 16. What year did you move from Portsmouth to Saco?

Ans. About 1853, I guess; I have nothing to guide me in these data; it might have been a year later or a year earlier.

X 17. Were such cigars sold in Saco while you did business there?

168 Ans. I heard of such a brand, and suppose they were sold.

X 18. Sold in Saco?

Ans. A cigar is not sold exclusively in one place; if sold at all it is sold all over the country.

X 19. Do you know of such cigars being sold in Saco while you were doing business there?

Ans. I never saw them sold; never saw any of the cigars.

X 20. Did you ever know of their being sold in Portland until they were sold by Mr. Ponce some two years ago?

Ans. No, sir.

X 21. Are you able to give the name of any one whom you know to have sold these cigars before Mr. Ponce sold them?

Ans. I can't say of my own knowledge, for I never saw the cigars.

X 22. Are you able to state the exact name of the cigar you have heard to have been sold?

Ans. I am.

23. What was it?

Ans. "Normanda."

24. You have not heard of the "Norma" being sold for the past fifteen or twenty years, have you?

Ans. Not so late as that.

25. Are you able to give the name and address of any one in Saco or Portland who knows of his own personal knowledge of the sale of "Normanda" cigars previous to Ponce's selling them?

Ans. There is one man who sold them in Biddeford; he is now dead—Dr. Pearson. I don't recollect just now of any man now living who sold them.

X 26. Do you know of Ponce's selling such cigars previous to about two years ago?

Ans. I do not.

X 27. For how many years have you been doing business as a neighbor of Ponce?

Ans. I can't tell; Mr. Ponce has been on the street off and
169 on; I have known him ever since he came here, being a part of the time in the same business. I have been in business here ever since Mr. Ponce came here.

SOLOMON MATHIAS.

Attest: A. H. DAVIS, *Clerk.*

Deposition of David Fonseca.

PORTLAND, *Dec.* 4, 1883.

Direct examination by WM. HENRY CLIFFORD, Esq., counsel for respondent:

Int. 1. What is your name, age, residence, and occupation?

Ans. David Fonseca; 52 years old; Boston, Mass.; cigar-maker.

2. Are you acquainted with two brands of cigars called "La Normandi" and "Normanda," one manufactured by Stachelberg & Co., of New York, and the other by Ernesto Ponce, of Portland, Me.?

Ans. I am acquainted with the two brands and also with the parties who manufacture them.

3. How long have you been acquainted with the brand "Normanda," applied to cigars and cigar boxes in this country?

Ans. I have made them since twenty-five, twenty-seven, or thirty years ago.

4. Please state where you yourself have made these cigars in this country at the times you have mentioned.

Ans. New York, Connecticut, Boston, Cambridgeport, and numerous other places where I have been at work in small towns. They were a common brand.

170 5. Please describe in what sort of boxes they were put up, how many bunches in a box, how many cigars in a bunch, what sort of ribbons used, etc.

Ans. 250 in a box, twenty-five in a bunch, with a common tape around them, worth about seventy-five cents a roll.

6. Please state how the boxes compared in size with those now before you—Complainants' Exhibit 2 and others.

Ans. About the same thing.

7. Will you state if the word "Normanda" was stamped or printed or in any way marked on the outside of the boxes in which you put the cigars made by you at the various places mentioned?

Ans. They were branded.

8. Without attempting to be exact at all in your estimate, state any number that you feel safe in saying that you have manufactured under this brand.

Ans. I don't really think I could answer a question like that. If I went to a shop to get a job I might work on that job for a month or two and then change to something else. I have manufactured myself and put them under these brands—well, 75,000 to 100,000.

9. Are you acquainted with Solomon Hyams, a cigar manufacturer now living in Boston?

Ans. Yes, sir.

10. How long have you known him?

Ans. Thirty-five or forty years ago.

11. Have you ever known of his manufacturing, making, or selling in Boston cigars branded "Normanda" and put up 250 in a box?

Ans. I don't know about him doing it; I know of other men doing it.

(Objected to; not responsive—last part of answer.)

12. How long ago are you aware that "Normanda" cigars put up in in the way mentioned were on sale in the city of New York?

171 Ans. I remember them about twenty-six years ago—even longer than that.

13. Please state how commonly, as well as you can, they were for sale, at the time at which you speak, in New York city.

Ans. At the time at which I speak there were no taxes on cigars. A cigar-maker could go and buy a few pounds of tobacco, sit at home in his house and make them up, and they used to go around to different places and buy these boxes—there was nothing against it—and pack them in these boxes.

14. State whether "Normanda" cigars put up in this way were or not pretty generally to be found in New York cigar stores, at the time of which we are speaking.

(Objected to; indefinite and leading.)

Ans. Yes, sir; they were a common cigar.

15. Will you now look at the boxes of cigars shown you—Complainants' Exhibits 1 and 2—and state if, in your opinion, as a cigar maker and manufacturer, the manner in which the "Normanda" is put up is calculated to deceive persons acquainted with cigars to

the extent of leading them to believe that they are the same as those marked "La Normandi."

(Objected to; witness not shown to be qualified as expert.)

Ans. I think any manufacturer could tell the difference.

16. Will you enumerate the differences which you notice between the methods of putting up these two boxes of cigars?

(Objected to as calling for a matter of general observation and not of evidence.)

Ans. First, they are two different brands; next, the ribbons are different; one is a common tape, while the other is more of a silk ribbon. There is a monogram on Exhibit 1 and none on Exhibit 2. There is a label on Exhibit 1 and none on Exhibit 2. Exhibit 2 has a hinge-box. They haven't got the same stencil.

17. In the case of ordinary buyers of cigars for daily smoking, persons not particularly acquainted with cigar packing or with
172 the different brands of cigars, upon what they are obliged to rely when purchasing of retail dealers, both when they ask for a particular brand and where they ask for a cigar of such and such a price?

Ans. Upon the honor of the party selling.

18. Do you think that persons acquainted with cigars and accustomed to judge of cigars by smoking could, by the mere smoking of Ponce's "Normanda" and Estabrook & Eaton's "Normandi," tell the difference, if there is any?

(Objected to as in int. 15.)

Ans. I think it would puzzle anybody to tell the difference.

19. Then, as you state, an experienced person would easily detect the difference between Exhibits 1 and 2 and an inexperienced one has to rely on the representations of the seller. Is this the fact concerning the way cigars are bought by these two classes of persons?

Ans. Yes.

Cross-examination by CLARENCE HALE, Esq., counsel for complainants:

X 20. At what place are you employed in Boston?

Ans. I carry on business for myself at 105 Leverett street, as a cigar dealer and manufacturer.

X 21. How long have you been in business for yourself at that place?

Ans. About four or five years.

X 22. What was your business before that?

Ans. I sold leaf tobacco for myself in Boston, at corner of Broad and State streets, for a short time.

X 23. What did you do before that?

Ans. I superintended business for John S. Stevenson, liquor dealer, in Faneuil Hall Square, from about 1873–'7.

X. 24. What did you do before that?

173 Ans. Tending a cigar store for a Mr. Greggs, on Cambridge street, 90 something, for about two or three years.

X 25. What were you doing before that?

Ans. Working around—journey work—as a cigar-maker.

X 26. For whom?

Ans. For different parties, in Boston and out of town.

X 27. How many years were you in that occupation?

Ans. I was doing that work off and on, part of the time working for myself, since 1854.

X 28. What part of that time was in Boston?

Ans. Considerable of that time. I came to Boston in 1854 from New York.

X 29. Have you been in business in New York since 1854?

Ans. Oh, yes.

X 30. What business, and by whom employed, and during what years?

Ans. I was making a few cigars for myself in New York about from 1855–'7.

X 31. At what location?

Ans. At boarding-houses where I was boarding—different places.

X 32. Name some of them.

Ans. It is so long a time that I can't remember the names of the streets nor the persons who kept the houses.

X 33. What brand of cigars did you make in New York?

Ans. Different kinds; the "La Norma," the "Normanda," and "La Normandi."

X 34. To whom did you sell cigars that you made?

Ans. Different parties around there—liquor stores, &c.

X 35. Name some of the liquor stores where you sold "Normanda" cigars.

Ans. I couldn't tell you the parties now. I know I have sold them in New York and other places.

X 36. Can't you give the name of anybody in New York to whom you sold "Normanda" cigars?

174 Ans. No, sir; I wouldn't be willing to say; I could not. I made up a few hundred at a time and sold them where I could. I did not ask the name. I got my money and went off.

X 37. On what streets were the stores at which you generally sold "Normanda" cigars?

Ans. Anywhere I happened to be traveling in the city of New York or Brooklyn, round the Bowery, over in Brooklyn, and any of them places.

X 38. Can you name any store in the Bowery where you were accustomed to sell?

Ans. I wasn't accustomed to sell in any particular store in the Bowery or anywhere else. I sold them wherever I could—in liquor stores, larger beer saloons, anywhere I could. I can't name any store. It is a good many years ago.

X 39. Did you know Hyams at that time?

Ans. Yes, and before that time.

X 40. Who were some of the principal cigar manufacturers in New York at that time?

Ans. I remember Mark Sharkie, who was about as big a manufacturer as there was there then. Joe Vandewater and Jack Vandewater were over in Brooklyn. There was Levine & Stachelberg, in New York. These are all the names I can think of.

X 41. Of whom did you purchase the cigar boxes into which you put the cigars you made and sold, as you have said?

Ans. Of different parties; I could not tell the parties' names.

X 42. Can't you tell the name of anybody of whom you purchased cigar boxes?

Ans. No, sir. It was some time ago and I can't remember.

X 43. Who were some of the principal cigar-box makers in New York at that time?

175 Ans. I am sure I can't tell; there were any quantity of box-makers there.

X 44. Did you purchase the cigar boxes you used of box-makers or of cigar manufacturers and dealers?

Ans. No; I went round and bought old boxes wherever I could find them, at liquor stores, drug stores, and cigar stores.

X 45. Had you a personal acquaintance with Hyams at that time?

Ans. I had not.

X 46. Can't you give the name of a liquor store, drug store, or any other place where you bought old boxes at that time?

Ans. No, sir.

X 47. When did you begin to manufacture a brand of cigars called "Normanda?"

Ans. Between 1855–'6, in New York.

X 48. Were you at work for yourself or for some one else then?

Ans. Working in the shop daytimes and at night for myself.

X 49. Were you making these cigars for yourself or for some one else?

Ans. I can't exactly say.

X 50. For whom were you working daytimes at that time?

Ans. It is so long ago that I can't remember the party's name.

X 51. For how many people did you work while you were in New York?

Ans. I wouldn't be able to say.

X 52. About how many?

Ans. I can't tell.

X 53. For more than five different people?

Ans. I should judge I did.

X 54. More than ten?

Ans. I wouldn't be willing to say.

X 55. Give the names of as many as you can for whom you worked.

Ans. I forget the parties, sir.

176 X 56. Can't you remember the name of any man for whom worked?

Ans. No, sir; I cannot.

X 57. Who else besides yourself manufactured "Normanda" cigars while you were in New York?

Ans. Most all of the manufacturers were putting them up.

X 58. What manufacturer can you swear was manufacturing "Normanda" cigars while you were there, from 1855–'7?

Ans. I shouldn't be willing to swear that any one was making them. I made them myself.

X 59. Can you swear that you saw any "Normanda" cigars while you were in New York made by anybody but yourself; if so, where did you see them, who made them, and in whose possession were they when you saw them?

Ans. Yes. Different manufacturers used to give these "turn-in" jobs to cigar-makers, and these cigar-makers used to put on men to make these cigars or any other kind.

X 60. Name some of the manufacturers who had "Normanda" cigars made in the way you have described.

Ans. It was the cigar-makers that I refer to now, who made these "turn-in" jobs. It would be difficult to know who hired them.

X 61. Name some of the cigar-makers who made those "turn-in" jobs you refer to?

Ans. It would be pretty hard for me to tell; they were, many of them, Germans.

X 62. Can you give the name of anybody now living who knows that "Normanda" cigars were made and sold in New York at the time you speak of?

Ans. I should judge that there are any number of old cigar-makers that know it. I know one cigar-maker that told me he made them in Baltimore. His name is Charlie Church, now living in Boston. I cannot give the name of anybody in New York.

(Objected to as irresponsive.)

177 X 63. What is Charlie Church's address and business in Boston?

Ans. He is one of the bosses of the "Boston Co-operative." His address is Sudbury street; the number I don't know. His place of business is at the lower part of Sudbury street, and the firm for which he works is called "The Boston Co-operative."

X 64. How many "Normanda" cigars did you make while in New York?

Ans. A good many thousand, I guess.

X 65. About how many?

Ans. If I should say 65,000 or even more I should not be much out of the way.

X 66. You have stated, in answer to int. 8, that you have made yourself some 75,000 in all; where did you make the other 10,000?

Ans. I might have made them in a good many places.

X 67. Where did you make them?

Ans. I might have made them in Connecticut; I might have made them in Boston or different parts of New York.

X 68. Taking it for granted that you might have made them most anywhere, where did you, in fact, make them?

Ans. I wouldn't be willing to say.

X 69. Then you can't swear where you made another "Normanda" cigar, except in New York?

Ans. Oh, yes; I can; I didn't say that.

X 70. Where?

Ans. It might have been in Boston; it might have been in New York; it might have been in Connecticut. I wouldn't be willing to say.

X 71. Can you swear that you made any in Boston?

Ans. I swear that I made them, but I won't swear to the place where I made them.

X 72. Will you swear that you made them within the city of Boston?

178 Ans. No, sir; I wouldn't swear that I made them in either of those places. I swear that I made them.

X 73. Are you dealing in them now?

Ans. I am making them now, and I shall always continue making them.

X 74. In whose employ are you making them?

Ans. In my wife's employ.

X 75. For how long time have you made them in Boston?

Ans. For my own use I have made up, perhaps, two boxes or 1,000 of them at a time within the last four years, since I have been working for my wife.

X 76. Does your wife carry on quite an extensive business as a manufacturer and dealer?

Ans. No, sir.

X 77. How many cigars does she make a year?

Ans. It may be sixty or seventy thousand; sometimes less.

X 78. How many "Normanda" cigars or about how many has she made since you have been in her employ?

Ans. It might be 2,000 or it might be 5,000.

X 79. How many "Normanda" cigars did you make in Boston previous to going into her employ?

Ans. I was superintending for one or two parties, and I was in the leaf-tobacco business. They were a common cigar, made by pretty nearly all the manufacturers, and they are to-day, too. I could not say how many.

X 80. For what manufacturers were you at work when you made "Normanda" cigars in Boston?

Ans. Well, I can't tell you. I made them for myself.

X 81. What year or about what year did you first make "Normanda" cigars in Boston?

Ans. That I can't tell.

X 82. What year did you begin to do business in Boston or about what year?

Ans. I may say about 1858.

X 83. Did you begin to make "Normanda" cigars or

179 "La Normandi" cigars as soon as you began to do business in Boston?

Ans. I began to make them, I think, about 1858, while I was do-

ing journey work—I mean the "Normanda." I made the same cigar and put it into either a "Normanda" or "La Normande" box, as I could find them, or a "La Norma" box, and I did the same in New York.

X 84. For whom were you at work in journey work when you began to make these cigars in Boston, in 1858?

Ans. I can't tell whether I was working in a shop or for myself.

X 85. In whose shop did you work at that time?

Ans. I can't tell whether I was working at that shop or at my own place.

X 86. Whose shop do you mean by "that shop?"

Ans. I don't know that I was working in a shop at all. I might have been working at my own place.

X 87. In whose shop did you work after you came to Boston?

Ans. I worked for a man by the name of Baxter, and a considerable time for my brother—most of the time for my brother while in Boston. Then I would travel off into the little towns.

X 88. Who and where is Baxter?

Ans. He used to keep in Cambridgeport—Ike Baxter. I can't tell where he is now; don't know whether he is living or not. He used to have these "turn-in" jobs. I haven't known about him for over twenty years, except that he was farming.

X 89. Where is your brother?

Ans. In Cambridgeport now, carrying on the cigar business there now. His name is Moss Fonseca. He used to do business in Portland, Me.

X 90. Did you make "Normanda" cigars for either Mr. Baxter or your brother as early as 1858?

Ans. It seems to me that I did; it seems to me I was in
180 Boston at that time, and, if so, I was. I was working for one of them.

X 91. Is there any one now living who you know would swear that you made "Normanda" cigars in Boston as early as 1858?

Ans. My brother might. I can't say that he would. I know that I made them.

X 92. Is there any one living who knows that you made "Normanda" cigars in Boston as early as 1865?

Ans. I would not be able to swear that there is.

X 93. Is there any one who knows that you made them anywhere else as early as 1865?

Ans. I suppose there is if I should look after them. I can't think of anybody now.

Redirect by Mr. CLIFFORD:

R. D. 94. At the times when you were in New York I wish you would describe the way journeyman cigar-makers were employed, whether they were continually shifting from one employer to another, and whether the times of employment were apt to be short, and give as good a description as you can of the way journeymen worked in those days.

Ans. In those days a great many men carried on the business

down-town, and they would give a cigar-maker two or three cases of tobacco to take home. They made up the cigars and carried them down-town of a Saturday in a basket, not packed. Then they would draw their pay for those cigars; then they would come home and pay the men that they employed. A man could go into a shop and get a job; he could quit that job and go elsewhere; they were going and coming, just as they had a mind to.

R. D. 95. Was it not the custom also for the cigar-makers
181 to make cigars, box and sell them on their own private account, as you have testified that you did?

Ans. Yes, sir.

R. D. 96. Would or not a man thus buying up emptied boxes obtain the boxes at a very cheap rate?

Ans. Yes, sir; they would also get an order from some of these places and they would furnish the boxes—a common thing, that was.

R. D. 97. What is your present address, where you can be found if wanted by either side?

Ans. 105 Leverett street.

D. FONSECA.

Attest: A. H. DAVIS, *Examiner.*

Additional Evidence for Complainants.

NEW YORK, *June* 24, 1884—11 a. m.

Pursuant to notice for taking depositions in the above-entitled matter on behalf of the complainant appears Clarence Hale, Esq., for complainants; William Henry Clifford, Esq., for respondents.

Deposition of George W. Nichols.

Direct examination by Mr. HALE:

GEORGE W. NICHOLS, called on behalf of the complainants, being duly sworn, deposes and says:

Int. 1. What is your name, age, residence, and occupation?
182 Ans. George W. Nichols; aged 54; occupation, manufacturer of cigars.

2. Where do you conduct your business?

Ans. At No. 79 Pine street, New York.

3. How long have you been manufacturing cigars?

Ans. I have been in the business as a manufacturer—for myself, you mean?

4. How long have you been for yourself, and how long have you been in the business?

Ans. I have been in the business since 1845, and I have been manufacturing myself for twenty-four years.

5. Since 1845 what acquaintance have you had with the different brands of cigars, imported and domestic?

Ans. Well, I have dealt largely in them, both imported and the domestic, other than those that I have manufactured or that were

manufactured by my father. I was a dealer before I was a manufacturer, and bought of the different brands of cigars and knew them. I bought the "La Normandi," although I did not buy them directly from the manufacturer at that time. I have bought the cigars and sold them. They have come under my observation, and I have had inquiries for them.

6. That is, since 1857 you have dealt in the "La Normandi" cigars?

Ans. Say about 1857; about that time.

7. Have you, since 1850, been well acquainted with all the brands of cigars for sale in New York city?

Ans. Well, of course, when you say all brands I cannot answer to that. There were perhaps 500 brands of the different kinds.

8. Calling your attention to the time when there were fewer brands, say from 1850 to 1860, were you acquainted with all the different brands at that time?

Ans. I was acquainted with all the leading brands of cigars
183 in those days, though the leading brands more particularly were imported cigars.

9. And were you also acquainted with domestic brands of cigars?

Ans. Yes, sir; but there were very few of those in those times.

10. Did you ever hear from 1850 to 1870 of a cigar called "Normanda" or "La Normanda?"

Ans. No, sir.

11. Did you ever hear of such a brand?

Ans. No, sir.

12. From your knowledge of the cigar trade and the different brands of cigars, especially of the domestic cigars, what would you have known of such a brand if it had been in existence?

(Objected to.)

Ans. I think I should have heard of it if there had been a brand of that kind.

13. Since 1857 has the "La Normandi" brand been a well-known brand of cigars?

Ans. Yes, sir.

14. And where, to your knowledge, has its trade extended—throughout the East?

Ans. I imagine it has extended all throughout the East.

15. Has its reputation been good?

Ans. Yes, sir.

16. And well established?

Ans. Yes, sir.

17. And well known through New England?

Ans. Yes, sir.

18. And well known as a brand of cigars sold by Stachelberg & Co.?

(Mr. CLIFFORD: I object to the last four or five questions.)

19. State by whom those cigars have been manufactured.

184 Ans. When I was best acquainted with them they were made by Mr. Bijur.

20. And after that?

Ans. After that I heard that Mr. Stachelberg manufactured them.

21. And of late by whom have they been manufactured?

Ans. By Messrs. Stachelberg & Co.

22. And whether or not has it been well known in the community as a brand of cigars sold and manufactured by Stachelberg & Co.?

Ans. Yes, sir.

23. State, if you know, what the general repute of those cigars has been during the past few years.

(Objected to.)

Ans. It has been very high.

24. State whether or not it has been a leading brand of domestic cigars.

(Objected to.)

Ans. Well, I should judge it has been—in the East particularly.

GEO. W. NICHOLS.

Subscribed and sworn to before me this 24th day of June, 1884.

JOHN A. OSBORN,
U. S. Commissioner, S. D. N. Y.

Deposition of Solomon Gershel.

Direct examination by Mr. HALE:

SOLOMON GERSHEL, called on behalf of the complainants, being duly sworn, deposes and says:

Int. 1. What is your name, age, residence, and occupation?

185 —. Solomon Gershel; 51 years of age; residence, 20 West 60th street, New York city; tobacco dealer; place of business, 191 Pearl street, New York.

2. How long have you been a tobacco dealer?

Ans. Since about 1869 or 1868.

3. Are you acquainted with the different brands of cigars sold in New York city?

Ans. Some; yes.

4. How long have you had such acquaintance?

Ans. Since about 1856, when I first manufactured cigars myself.

5. You were a cigar-maker?

Ans. Yes, sir; I am by trade.

6. During what years were you a cigar-maker?

Ans. From 1852 up until about 1856.

7. Since 1857 have you known the "La Normandi" brand of cigars?

Ans. About 1857 or 1858 I knew that brand.

8. Have you or not been well acquainted with that brand since then?

Ans. Yes, sir.

9. By whom has it been made?

Ans. By Mr. A. Bijur, first.

10. And since then by whom?

Ans. Mr. Stachelberg.

11. Did you yourself know of the fact that Stachelberg & Co. were the successors in business of A. Bijur?

Ans. Yes, sir.

12. And state what was the fact in that respect.

Ans. When Mr. Bijur went out of the manufacturing business he turned it over to Stachelberg. Mr. Stachelberg bought all his stock.

(Mr. CLIFFORD: I object to that as being secondary evidence.)

13. How do you know of this?

186 (Same objection.)

Ans. From common report in the tobacco business. All the trade knows about the tobacco manufacturers.

14. Were you accustomed to visit the factory of Bijur and afterwards of Stachelberg?

Ans. I was well acquainted with Bijur from 1852 to 1853 up, but I never was at his factory. I have been at Stachelberg's factory after that, about 1864 or 1865, when he kept in Cedar street.

15. During the past ten years the "La Normandi" cigars have been a good brand and well known to the public?

(Objected to.)

Ans. It is one of the best brands in the country.

16. State whether or not you know its general reputation in the community.

Ans. Yes, sir.

17. What is it?

Ans. It is very good.

18. After Stachelberg & Co. took up Bijur's business were you accustomed to meet Bijur and Stachelberg & Co.?

(Objected to.)

Ans. Yes, sir; very often.

19. In what way?

Ans. I went to try to sell them something and could not. They bought Bijur's tobacco. I went there to make a trade.

20. Has or not the "La Normandi" brand of cigars had an extensive sale?

(Objected to.)

Ans. Yes, sir.

21. In what part of the country?

Ans. In the East.

22. Now, Mr. Gershel, calling your attention to the different brands of cigars from 1850 to 1860, were there or not many domestic brands of cigars during those years?

Ans. Very few.

187 23. And were you or not, during all those years, acquainted with the different brands of domestic cigars?

Ans. Yes, sir; I was.

24. State fully what your acquaintance was, and how extensive.

Ans. When I manufactured, in 1856, we generally imitated imported cigars. There were very few domestic brands at that time.

25. During those years did you ever hear of a brand of cigars called "Normanda" or "La Normanda?"

Ans. I never heard of it.

26. Were you well acquainted in those years also with the different brands of imported cigars?

Ans. Yes, sir.

27. Did you ever know of a brand of imported cigars known as "La Normanda?"

Ans. No, sir. There were the "Noriegas" and the "Partagas."

28. What were the leading brands of domestic cigars?

Ans. I don't remember anything else, except in 1857 or 1858 the "La Normandi" came out. We made some of those cigars in old boxes ourselves.

29. Of the domestic cigars in those years there were very few brands?

(Objected to.)

Ans. Yes, sir.

30. State whether or not, from your knowledge of the trade, if there had been such a cigar as the "La Normanda" would you have known about it.

(Objected to.)

Ans. Of course, being in the trade, I would have known of it.

(Mr. CLIFFORD: This testimony is objected to on the ground that it is not in rebuttal.)

188 Cross-examination by Mr. CLIFFORD:

X 31. When you were making cigars, for whom were you working between 1850 and 1856?

Ans. In New York city, for Mr. Bijur and Mr. Levin.

X 32. How old were you then?

Ans. About eighteen or nineteen years old.

X 33. Were you employed making cigars as a workman?

Ans. Yes, sir.

X 34. You did not know as much about the market then as you do now?

Ans. Not in 1852; but I did in 1856.

X 35. In fact, a boy, as you were at that time, you did not know very much about it?

Ans. I knew a great deal then.

X 36. You could not swear that you knew all the brands of cigars that were manufactured in New York at that time?

Ans. No, sir; not all; but I knew about the leading brands.

X 37. Have you any doubt but that there were numbers of brands of cigars made in a small way throughout the country, as well as in New York city, at that time of which you knew nothing?

Ans. I did not know what was made in the country, but I knew what was being made in New York.

X 38. Your evidence substantially amounts to this: Beyond the Bijur "La Normandi" brand that is all you knew of such a brand at that time?

Ans. I knew the "La Normandi" brand in 1857 or 1858.

X 39. And all that you know about it is that it was a brand manufactured by Bijur?

Ans. Yes, sir.

X 40. And subsequently all that you knew about it is that it was manufactured by Stachelberg & Co.?

Ans. Yes, sir; and I smoked some of them in the country—in Hartford and Springfield.

189 *De bene esse:*

X 41. You say these cigars have at present a large sale in the East; how do you know that?

Ans. I have been traveling in the East. I have been in Hartford sometimes three or four times in the winter, and I also used to go to Springfield.

X 42. How do you know—that is the question?

Ans. The leading cigar at the Allyn House, in Hartford, is the "La Normandi," as a domestic cigar.

X 43. Have you any further source of knowledge?

Ans. No, sir.

X 44. What did you know of the imported brands of cigars when you were a workman for Bijur?

Ans. We bought them sometimes at Gilsey's, in Broadway. They were cheap at that time, and we bought them. They were only six cents.

X 45. You did not know a great deal about imported brands at that time?

Ans. No, sir.

X 46. How long ago can you testify that you began to have a moderate acquaintance with imported brands of cigars?

Ans. About 1856 and 1857; about that time.

X 47. Not before?

Ans. I saw some and smoked some. At that time we manufactured them and called them imported brands.

X 48. When did you first begin to have an extensive knowledge of imported brands of cigars that you can testify about?

Ans. From 1856 up.

X 49. When did you first begin to have an extensive knowledge of the domestic brands of cigars—their names, trade-marks, brands, &c.?

Ans. From 1858, so on, up.

190 Redirect:

49. From 1850 to 1860 did you or not have a knowledge of the domestic cigars in public use in New York city?

Ans. Yes, sir.

50. Did you or not have a thorough knowledge of the domestic cigars in public use in this city at that time?

Ans. Well, some; I would not say all, but some.

51. And did you or not ever hear of a brand called "Normanda" or "La Normanda" in public use in New York city?

Ans. I never heard of it in public use—neither "Normanda" or "La Normanda."

52. You never heard the name at all?

Ans. Never.

SOLOMON GERSHEL.

Subscribed and sworn to before me this 24th day of June, 1884.

JOHN A. OSBORN,
U. S. Commissioner, S. D. N. Y.

Deposition of Isaac Hamberger.

ISAAC HAMBERGER, called on behalf of the complainants, being duly sworn, deposes and says:

Direct examination by Mr. HALE:

Int. 1. What is your name, age, residence, and occupation?

Ans. Isaac Hamberger; 56 years old; tobacco merchant; I reside at 161 East 63d street; my place of business is at 151 Water street, New York city.

191 2. How long have you been a tobacco merchant?

Ans. Off and on since 1849.

3. Have you or not, since 1857, been acquainted with a brand of cigars known as "La Normandi?"

Ans. Yes, sir.

4. How long have you known it?

Ans. I have known that brand just the same as several other brands of well-known notoriety at that time.

5. How well known has this cigar been during the past ten years?

Ans. I don't know; I have not paid any attention to that.

6. Was it or not a well-known brand after 1857, to your knowledge?

Ans. After 1858 I have not paid any attention to the cigar brands particularly. Up to 1858 I did.

7. Were you acquainted with the different brands of domestic cigars in public use in New York city from the year 1850 to 1860?

Ans. Yes, sir; pretty well.

8. Were there or not as many domestic brands of cigars at that time as there are now?

Ans. No, sir; there were not many.

9. Were there few or many?

Ans. Very few. Most of the brands at that time were made in

imported boxes; that is, domestic cigars were put into imported boxes and they were sold.

10. What was your business from 1850 to 1858?

Ans. My business was manufacturing cigars, selling tobacco, selling empty boxes, cigar ribbons, and all manufacturers' utensils.

11. Were you accustomed to buy up old cigar boxes and cigar ribbons?

Ans. Yes, sir.

12. Did you or not ever hear in those years of a brand of cigars called "Normanda" or "La Normanda?"

192 Ans. I never did. There was a brand at that time called "La Norma."

13. That was an imported brand?

Ans. Yes, sir.

14. Did you ever hear of an imported brand called "Normanda" or "La Normanda?"

Ans. No, sir.

15. And in your purchase and sale of old cigar boxes did you ever have the name presented to you or come before you in any way of "La Normanda" or "Normanda?"

Ans. No, sir; I do not recollect it.

16. And was there any such brand in public use in New York city in those years?

(Objected to as incompetent.)

Ans. No, sir; not to my knowledge.

17. During the last few years you have been acquainted with the reputation of the different brands throughout the country, have you not?

Ans. No, sir; I have not paid any attention to them.

18. From your knowledge of the trade from 1850 to 1860, if a cigar had been in public use called "Normanda" or "La Normanda" would you have known of it?

(Objected to as calling for an inference.)

Ans. I think I would.

Cross-examination by Mr. CLIFFORD:

X 19. Do you make oath that in 1858 you knew every brand of imported cigars brought into the port of New York?

Ans. No, sir; not every brand.

X 20. Do you make oath that you were acquainted with every brand of domestic cigars at that date?

Ans. No, sir.

X 21. Then a brand of cigars called "La Normanda"

193 might have been in existence and you not know it, since you did not know every brand?

Ans. It might have been in existence without my knowledge.

Redirect:

22. But might it have obtained public notoriety and might it have been common—in public use—without your knowledge?

(Objected to.)

Ans. Not very well.

23. Was your acquaintance during those years extended through the saloons and restaurants in your purchases of old cigar boxes?

Ans. Yes, sir; all over the city.

24. And did you or not ever hear in those years of a cigar by the name of "La Normanda" or "Normanda" ever obtaining public use in the saloons or restaurants?

Ans. I believe I never heard the name before it was mentioned here.

Recross:

X 25. Can you positively swear that you never did hear the name of "La Normanda" until you heard it mentioned here?

Ans. Yes, sir.

X 26. How early did you hear of "La Norma," as well as you can remember?

Ans. As far back as 1850 or 1851.

X 27. Were you ever employed by Bijur or Stachelberg?

Ans. I never have been.

X 28. Did you have any business connections with them?

Ans. Never.

X 29. Did you sell their cigars?

194 Ans. Never.

X 30. Were you summoned?

Ans. Yes, sir; of course.

Redirect:

31. Did you ever have any business at all with Stachelberg & Co.?

Ans. No, sir.

32. You were subpœnaed in this case, were you not?

Ans. Yes, sir; I was.

ISAAC HAMBERGER.

Subscribed and sworn to before me this 24th day of June, 1884.

JOHN A. OSBORN,
U. S. Commissioner.

Deposition of Marcus Oppenheimer.

MARCUS OPPENHEIMER, called on behalf of the complainants, being duly sworn, deposes and says:

Direct examination by Mr. HALE:

Int. 1. What is your name, age, residence, and occupation?

Ans. Marcus Oppenheimer; 47 years old; 64 West 56th street; occupation, tobacco dealer; place of business, 138 Water street.

2. How long have you been a tobacco dealer?

Ans. Since 1865 on my own account.

195 3. What was your business before 1865?

Ans. I was a clerk in a cigar factory and dealt in tobacco also from 1855 to 1865.

4. What was your business before 1855?

Ans. I attended school.

5. Do you know a brand of cigars called "La Normandi?"

Ans. Yes, sir.

6. By whom is that cigar manufactured?

Ans. As much as I know of, it is manufactured now by Stachelberg & Co.

7. Is it or not a well-known brand?

Ans. It used to be at the time I was in the cigar business. I don't know so much about it now.

8. And what was its reputation then?

Ans. It had a good reputation for a good cigar.

9. And was it a cigar in general sale through the New England States?

Ans. My recollection of it is particularly from the East—Boston. We had some trade there.

10. Do you know whether or not it has an extensive sale in Boston and its vicinity?

Ans. It had at that time.

11. Between what years was that?

Ans. Between 1855 and 1865.

12. Have you ever heard of a brand of cigars called "La Normanda" or "Normanda?"

Ans. No, sir.

13. How extensive has been your knowledge, Mr. Oppenheimer, of the different brands of domestic cigars in public use in New York city since 1855?

Ans. I knew the most leading brands.

14. And what has been your knowledge of the different leading brands of cigars in public use throughout the Eastern market—Boston, &c.

Ans. We manufactured then ourselves several brands
196 which were sold extensively in the East. We made some cigars to come as near the "La Normandi" as possible and packed them up in the same way, and we used the name "La Norma" for them.

15. Have you or not known of any such brand in public use as "La Normanda" or "Normanda?"

Ans. No, sir.

16. And you say you were in a way of knowing the different brands of cigars so as to seize upon any idea that you could get from those different brands?

(Objected to as leading and not testified to by witness.)

Ans. I don't know exactly what you mean, sir.

17. From the different brands in public use were you or not accustomed to adopt any element that you could get?

Ans. Yes, sir.

18. And did or not that lead you to inquire pretty fully into the different brands of cigars in public use?

Ans. That was our business.

19. State whether or not any such cigar as that could have been in public use without your knowing of it—a cigar in public use called "La Normanda."

(Objected to.)

Ans. I think I would have known of it.

(Mr. CLIFFORD: I object to the deposition on the ground that it is not in rebuttal.)

Cross-examination by Mr. CLIFFORD:

X 20. You were not acquainted with all the different brands of cigars?

Ans. No, sir.

X 21. Neither imported nor domestic?

Ans. Neither imported nor domestic.

X 22. Many might have existed without your knowledge?

197 Ans. They might.

X 23. "La Normanda" might have been in existence without your knowledge?

Ans. It could not have been.

X 24. The same as many others?

Ans. Yes, sir.

Redirect:

25. You say many brands of cigars might have been in existence; might they have become in public use and you not know it?

Ans. No, sir; if they became prominent I would have known them.

M. OPPENHEIMER.

Subscribed and sworn to before me this 24th day of June, 1884.

JOHN A. OSBORN,
U. S. Commissioner, S. D. N. Y.

Deposition of Julius Hilborn.

JULIUS HILBORN, called on behalf of the complainants, being duly sworn, deposes and says:

Direct examination by Mr. HALE:

Int. 1. What is your name, age, residence, and occupation?

Ans. Julius Hilborn; 52 years old; 334 West 22d street;

198 traveling salesman; place of business, 76 Franklin street, New York.

2. Traveling salesman in what line?

Ans. Notions.

3. Have you or not a knowledge of the different brands of cigars

in public use in New York city; and, if yes, for how long have you had such knowledge?

(Objected to.)

Ans. From 1850 to 1868 and 1870.

4. What was your business at that time?

Ans. Wholesale and retail cigars.

5. That was from 1850 to 1870?

Ans. Yes, sir.

6. After about 1857 were you or not acquainted with a cigar called "La Normandi?"

Ans. We were sole agents for that brand in the East.

7. Were or not those cigars well known in the East?

(Objected to.)

Ans. As a domestic cigar, better than any other.

8. State quite fully how extensively those cigars sold in the East, and whether or not their sale was increased, and state with regard to their general reputation as a domestic brand of cigars.

Ans. We introduced the cigar in the East, and their reputation, as well as their sale, constantly increased. The sales amounted to hundreds of thousands a year, and the sales have constantly increased since that time.

9. During those years and back as far as 1850 were you acquainted with the different domestic brands of cigars in public use in New York city and the East?

(Objected to.)

Ans. Yes, sir.

10. Did you ever hear of a brand of domestic cigars in those years called "Normanda" or "La Normanda?"

Ans. Never.

199 11. State quite fully what your means of knowledge were of the different domestic brands of cigars from 1850 to 1870.

Ans. Well, up to 1860 or before the war, strictly speaking, there were very few brands of domestic cigars that were exclusively domestic; the imported brands were in general use; there were very few domestic brands sold, as compared to the present time—comparatively speaking.

12. You say there were very few; what was your means of knowledge; how do you know that there were but very few?

Ans. By dealing in them.

13. What house were you connected with in those years?

Ans. With my uncle, W. S. Kingsbury, who was Mr. Bijur's sole agent.

14. State what the extent of Mr. Kingsbury's business was.

Ans. He was one of the largest cigar dealers in the city of Boston at that time.

15. And you were employed by him in New York?

Ans. No, sir; in Boston.

16. And did your trade take you to New York part of the time?

Ans. Yes, sir; afterwards I became established in New York, Washington, and San Francisco.

17. And did you know all the domestic brands in public use then?

Ans. That would be too broad an answer to make.

18. As far as you know?

Ans. If there was an important brand I knew it. If it was a brand in popular use I should have known it.

19. With regard to imported brands, were you acquainted with the different imported brands?

Ans. Thoroughly.

20. Did you ever hear of any imported brands of cigars called "La Normanda" or "Normanda?"

Ans. Never in my experience. I never knew of any brand
200 of cigars called "Normanda" or "La Normanda," imported or domestic.

21. Did you ever hear of the name at all?

Ans. No, sir.

Cross-examination by Mr. CLIFFORD:

X 22. Have you ever heard of an imported brand of cigars called "La Normandi?"

Ans. No, sir.

X 23. Or "Normandi" or "La Normandi," with the accent on the first syllable.

Ans. How is it spelt?

X 24. I now ask you if you heard popularly and publicly pronounced as the name of an imported brand of cigars, one called "Normandi" or "La Normandi," independent of the way of spelling it?

Ans. Except as a domestic cigar, I never heard of it.

X 25. When did you first hear of it as a domestic cigar?

Ans. 1856 or 1857—1857.

X 26. Where?

Ans. In Boston.

X 27. Who made them?

Ans. A. Bijur.

X 28. How was that word spelled, as you remember it?

Ans. N-o-r-m-a-n-d-i.

X 29. Have you ever seen a brand spelled N-o-r-m-a-n-d-a?

Ans. No, sir.

X 30. Or L-a N-o-r-m-a-n-d-a?

Ans. No, sir.

X 31. How were you employed from 1850 to 1855?

Ans. In California.

X 32. What doing?

Ans. Selling cigars there.

201 X 33. What cities in California?

Ans. San Francisco.

X 34. You were there from 1850 to 1855?

Ans. Yes, sir; in fact up to the commencement of 1856. I arrived in New York in January, 1856.

X 35. How long did you stay here in this city—New York?
Ans. A very short time. I went to Boston.
X 36. How long did you live in Boston?
Ans. About two years.
X 37. Where did you go then?
Ans. I came to New York.
X 38 That brought you to 1859?
Ans. Yes, sir.
X 39. And how long did you remain in New York?
Ans. From 1859 to 1861, until the war broke out, and then I moved to Washington.
X 40. Then from 1850 to 1855 you were not in the cigar business in New York?
Ans. No, sir.
X 41. Then you had no acquaintance with the brands in vogue in the city of New York?
Ans. No, sir.
X 42. And up to 1856?
Ans. No, sir; not in the city of New York.
X 43. Neither had you any acquaintance with the brands in vogue in New England from 1850 to 1856?
Ans. No, sir.
X 44. So that your testimony does not apply to that period of time in either of those places?
Ans. I stated that.
X 45. What is your present business?
Ans. Selling notions.
X 46. Have you a place of business in the city of New York?
Ans. Yes, sir; as a salesman.

202 Redirect:

47. Did you, from 1850 to 1855, have a knowledge of the brands of domestic cigars in public use in the country?
Ans. There were no domestic cigars sold in San Francisco at that time.
X 48. But immediately after that, as soon as 1856, you did have that knowledge in New York city?
Ans. Yes, sir.

Recross:

X 49. How long did it take you after you came here in 1856 to acquire an intimate acquaintance with all the domestic and foreign brands of cigars in New York and New England?
Ans. In the course of my dealings——
X 50. How long did it take you?
Ans. I don't know. You might learn ten of them in a day and you might only learn one of them in a week.
X 51. How long would you be willing to testify that it took you, as a matter of fact, to learn about the different brands of imported and domestic cigars in New York and New England?
Ans. I should judge——

X 52. My question calls for time. Do you think you learned it in six months?

Ans. That is cornering me pretty close.

X 53. Don't you think a year would be as short a time as you would be willing to swear to that you obtained a familiar acquaintance with the foreign and domestic brands of cigars in New York and New England?

Ans. Oh, I misunderstood your question.

X 54. Now, will you state how long you are willing to testify, as a matter of fact, after you came back here in 1856,
203 it took for you to obtain this familiar knowledge with foreign and domestic brands of cigars in New England and New York?

Ans. About a year.

(Mr. CLIFFORD: Cross-examination *de bene esse*. Deposition generally objected to as not being in rebuttal.)

JULIUS HILBORN.

Subscribed and sworn to before me this 24th day of June, 1884.

JOHN A. OSBORN,
U. S. Commissioner, S. D. N. Y.

Deposition of Elias Spingarn.

ELIAS SPINGARN, called on behalf of the complainants, being duly sworn, deposes and says:

Direct examination by Mr. HALE:

Int. 1. What is your name, age, residence, and occupation?

Ans. Elias Spingarn; age, 48; residence, 118 East 58th street; occupation, tobacco merchant; place of business, 5 Burling Slip, New York.

2. How long have you been a tobacco merchant?

Ans. We have been in the tobacco business since 1868?

3. And in what place?

Ans. No. 5 Burling Slip.

4. In the same place?

Ans. We manufactured in the same place previously. We have been twenty-one years in the place, No. 5 Burling Slip.

5. Are you acquainted with a brand of cigars called "La Normandi?"

204 Ans. Yes, sir.

6. How long have you been acquainted with such brand?

Ans. I have been acquainted with it ever since it first came out, when we were in the cigar manufacturing business ourselves. I also kept three stores in New York, one in Broadway and one in Courtlandt street.

7. And what kind of a cigar is it and what, to your knowledge, is the extent and place of its sales?

Ans. At the time when it came out they were competitors to us. We tried to imitate everything we could find, and when a popular

cigar came out we tried to make it. About 1857 or 1858 Mr. Bijur, who was a good manufacturer, came out with this new brand of cigars called "La Normandi," and we made the cigar and called it "Noriegas."

8. Since that time, state what you know of its extent in reference to sales.

Ans. After Bijur went into the tobacco business he gave it over to Mr. Stachelberg, and it has had a very extensive sale ever since.

9. Is it a well-known brand of cigars?

Ans. Yes, sir; it has been since it was first made.

10. Throughout the market of the Eastern States?

Ans. Yes, sir.

11. You know that of your own knowledge?

Ans. Yes, sir. We also had agencies in Boston. We ought to know it.

12. During those years have you ever heard of a brand of cigars called "Normanda" or "La Normanda?"

Ans. No, sir. I heard of "La Norma," but that is an imported cigar.

13. Have you a knowledge of the different brands in public use of the domestic cigars?

Ans. Yes, sir; that was my business to know?

14. How long have you had such a knowledge?

205 Ans. Since about 1855, when I first commenced to keep stores.

15. Have you ever heard of a brand of domestic cigars called "Normanda" or "La Normanda?"

A. No, sir; I never did.

16. What has been your knowledge of the different imported brands of cigars?

A. My knowledge of the imported goods has been very extensive.

17. Have you ever known of an imported brand called "Normanda" or "La Normanda?"

A. Never.

Cross-examination by Mr. CLIFFORD:

X 18. When did you first begin business for yourself?

Ans. In 1854 I was with my brother in business, and I commenced in 1856 for myself.

X 19. Did you make cigars then yourself?

Ans. I made cigars long before that, but I never worked for anybody; I worked for my brother; I superintended everything, and then I opened a factory in 1856; but I was in a cigar store, in 1855, on the corner of Fulton street, where the Evening Post building now stands.

X 20. A retail cigar store?

Ans. We manufactured wholesale and we kept a few retail stores in Broadway.

X 21. Do you testify that you were acquainted then with all the brands of cigars that came into the port of New York?

A. All of the leading brands; yes, sir; that was my business to know.

X 22. Do you testify that you were acquainted with all of them that came in, leading or otherwise?

Ans. No, sir; that I could not tell. There might have
206 been some small manufacturers who sent in their cigars that had hardly any name, but any cigar that was well known I knew of it.

X 23. Any brands of cigars that were publicly known you did know?

Ans. Yes, sir.

X 24. And there might have been some brands in small quantities brought in that you did not know anything about?

Ans. Yes, sir.

X 25. When you speak of your extensive knowledge you mean that knowledge of the leading brands of cigars which every dealer has?

Ans. I was opposite to Park & Tilford. They were the most extensive dealers, and I was in opposition to them, and I had to keep myself posted and had to keep the same brands.

X 26. Is it not a fact that there are coming into this country, and have been in years gone by, small quantities of different brands of cigars not generally known?

Ans. Yes, sir.

X 27. That is continually recurring?

Ans. Yes, sir; small manufacturers commence and send their cigars here. The same thing happens to-day.

X 28. Is it not also the fact that there are always springing up small brands of domestic cigars not generally known, and it takes several years for them to become celebrated and generally known?

Ans. It may be to-day, but not in those days.

X 29. Still, it existed in those days?

A. Very little; we always imitated imported cigars.

X 30. The domestic manufacturers imitated principally foreign brands?

Ans. Yes, sir; I could mention you a hundred brands, if necessary.

X 31. And if a manufacturer sees some new brand coming
207 in in small quantities, and he thinks well of it, he picks it up?

Ans. No, sir. Excuse me! Why should he take a little brand? He would take a popular brand, add something to it, and make it a leading brand.

X 32. Would you swear that in 1855 you knew all of the domestic brands, big and little, notorious and obscure, that were made in the city of New York?

Ans. No, sir; not by any means.

X 33. Wasn't it the practice at that time for workmen in a small way to buy old cigar boxes, fill them, and retail them around?

Ans. Yes, sir.

X 34. You knew that as a fact?

Ans. Yes, sir; they send us oftentimes the filled boxes.

X 35. In this way, I suppose, workmen—cigar-makers—got a

little money besides their wages to help eke out their slender incomes?

Ans. Yes, sir.

X 36. And then they retailed them out themselves in some cases?

Ans. They sold them wherever they could get a customer.

X 37. In this way of selling them they always used some name that was familiar to them and put that name on the box and called them by that name?

Ans. These little fellows would come to a man and get the box and fill it. That was the way that was generally done.

X 38. Where he bought the boxes in that way he would keep the name on the box?

Ans. He paid for the name. For $10, at that time, you could get 1,000 good cigars.

X 39. And was it customary for the man who made them to retain the name on the boxes?

Ans. They used to get a few boxes and fill them up irrespective of the name.

208 X 40. The pay to cigar-makers in those days was much lower than it is to-day?

Ans. Yes, sir; a little lower; but good cigar-makers were paid well at that time.

X 41. How much were they paid then?

Ans. As high as $12 and $14 per thousand and as low as $3.

X 43. Medium goods were about what per thousand to make?

Ans. About $5 and $5.50.

X 43. To manufacture medium cigars what did they pay?

Ans. From $5 to $28.

X 44. What do they pay for manufacturing medium cigars now to a good workman?

Ans. I am not in the cigar business to know for certain, but they pay about $12.

X 45. For the best how much do they pay?

Ans. As high as $30.

X 46. For lower grades how much?

Ans. $2 in Pennsylvania.

X 47. I mean here.

Ans. In New York about $5.

X 48. Have you ever been a cigar-maker yourself?

Ans. Yes, sir.

X 49. How long did you work in the trade?

Ans. I was a cigar-maker before 1853. I was born in the cigar business, you might say. I smelled tobacco before I was born, I might say.

X 50. How long did you work yourself before 1853?

Ans. Maybe three or four months, when I commenced business myself.

X 51. Where was that?

Ans. Always in the city of New York.

X 52. With whom?

Ans. With my brother.

X 53. What did you do after that?

Ans. I went into business for myself. We joined together.

X 54. What was the name of the firm?

Ans. E. Spingarn & Company.

X 55. How long did you continue in that firm?

Ans. I believe we commenced in 1856, under the firm name of E. Spingarn, and then we joined together in 1863, and then we added the company.

X 56. What was the business of that firm up to the time that you went to Burling Slip?

Ans. Manufacturing; but only a few years in Burling Slip—about five years.

X 57. Retail stores, too?

Ans. We gave up the retail cigar business in 1864, except one store which we supplied. We gave it over to another man, and we supplied it with goods a little longer.

(Mr. CLIFFORD: Cross-examination *de bene esse*. Deposition generally objected to as not in rebuttal.)

Redirect:

58. You have been asked about knowing all the brands of domestic cigars, big or little. Did you not know all the brands of domestic cigars during the years that you have described in public use?

Ans. Yes, sir; only the leading brands.

59. You have been asked with regard to the trade of certain small retail dealers getting old cigar boxes and making cigars and filling the boxes. Were they not accustomed to take the leading brands of cigars?

Ans. Yes, sir; that is what I have said. They only took the leading brands. They always preferred them.

60. The trade was generally in taking old cigar boxes of leading brands?

210 Ans. The most leading brands, except if a man had just a few boxes to fill he would fill them up irrespective of the brand; but if he bought boxes he bought only leading brands.

61. You have been asked about the price of cigar-making, the wages, the prices which cigar-makers get for manufacturing the different brands of cigars. You don't know, of your own knowledge, how those prices run?

Ans. I have mentioned that very same thing. I could not mention the prices that are paid now, but I knew it at the time I was manufacturing.

62. So that all in reference to what they pay at present is merely estimate on your part?

Ans. Yes, sir.

Recross:

X 63. You have a general knowledge of the prices paid cigar-makers to-day, as well as the prices that were paid in the years 1867 and 1868?

Ans. I was better posted then than I am now. I have a general knowledge. Sometimes parties come in and tell me I have to pay so much and so much for such and such brands.

Redirect:

64. But you have no accurate knowledge as to how prices run to-day?

Ans. No, sir; not since we stopped manufacturing.

E. SPINGARN.

Subscribed and sworn to before me this 24th day of June, 1884.

JOHN A. OSBORN,
U. S. Commissioner, S. D. N. Y.

211 *Moses Kind Recalled.*

MOSES KIND recalled for further examination by Mr. HALE:

Int. 1. Will you state, in brief, whether or not the trade-mark alleged in our bill to be complained of—bill and amendment—to have been infringed, is or not of great value; and, if yes, of what value.

(Objected to as not rebutting in character and inadmissible at this stage of the testimony.)

Ans. It is almost impossible to give a sum as the value of the trade-mark. It is something that possesses a mercantile value, not so much in reference to the quantity of cigars that are sold, by the constantly increased from year to year, and to-day it is worth a very mere fact that they are packed under that brand. That value has large sum of money. It may be worth fifty, forty, or thirty thousand dollars. It is impossible to give an exact figure as to the value to it.

2. Please state further as to what damage, as far as you can estimate, the alleged infringement of the respondent has been to the complainants in this matter.

(Same objection.)

Ans. I must say, as I said a minute ago in relation to the value of the trade-mark, it is almost impossible to put a figure on the damage. The damage is not alone in a direct money loss, but the damage is also in this way, that these cigars, although they may be sold to dealers as manufactured for or by Mr. Ponce, yet the people who buy the cigars in a great many instances buy them as our "La Normandi" cigars; and they not being as good cigars as ours, it decreases our sales. As near as I can put a value on the damage, it would be anywhere from six to twenty thousand dollars.

(Objected to as not responsive.)

MOSES KIND.

212 Subscribed and sworn to before me this 24th day of June, 1884.

JOHN A. OSBORN,
U. S. Commissioner, S. D. N. Y.

Additional Evidence for Respondent.

PORTLAND, *July* 19, 1884.

Present: Wm. Henry Clifford, Esq., counsel for respondent; Clarence Hale, Esq., counsel for complainants.

Deposition of Julius M. Cohen.

Direct examination by Mr. CLIFFORD, counsel for respondent:

Int. 1. What is your name, age, residence, and occupation?

Ans. Julius M. Cohen; age, 33 years; residence, 107 Warren street, Boston Highlands; occupation, cigar manufacturer, at 85 State street, under the firm name of Boston Co-operative Association.

2. How long have you been engaged in the cigar business?

Ans. Seventeen years.

3. With whom did you work when you first entered into the cigar business?

Ans. With S. M. Hyams.

4. Where did you so work, and for how long a time?

Ans. Hanover street, Boston; the number I do not remember, but the store was under the Blackstone House. I worked there from 2½ to 3 years.

5. What did you do while thus employed by Hyams?

213 Ans. I made cigars and retailed cigars at said store.

6. Do you remember of making and selling or either of a brand of cigars called "Normanda" while in Hyams' employ?

Ans. Yes, sir.

7. State whether you found such a brand of cigars on sale in the shop when you began to work there.

Ans. I did.

8. Please describe how the cigars were put up, how many in a bunch, how many in a box, the shape of the boxes, and the bands which tied up the bunches.

Ans. The cigars were put up in an oblong box containing 250 cigars; packed in bundles of 25; tied with ribbons printed on "Normanda."

9. Look at the box now shown you, Respondent's Exhibit C, and state whether the boxes used in Hyams' store at that time were similar or unlike this one in shape.

Ans. The same as this in shape.

10. Was or not the word "Normanda" in some way imprinted on the outside of the boxes?

Ans. On the cover of the box.

11. Please give the name, if any, which this store carried, and state on what the name was printed.

Ans. He called the store "Depot for Normanda Cigars;" and this was printed on our business cards.

12. How much of a sale was there for these "Normanda" cigars while you were there?

Ans. I never took any account of stock of the sales of the store; but the "Normanda" cigars were our leading and principal cigar that we were selling.

13. What was the color of the ribbons by which the bundles were tied?

Ans. A regular "Normanda" ribbon—a woven ribbon, with yellow borders and a dark brown center, and in the center of that another yellow line, made of cotton.

14. Are there or not other brands of cigars in this country
214 put up in long boxes—250 in a box and 25 in a bunch, like the Exhibit C which has been shown you; and, if so, will you name some brands, to your knowledge, packed in that manner, and state by whom made, put up, and sold?

Ans. A cigar box of 250 is recognized as a "Normanda packing" and used by cigar manufacturers in common. To the best of my knowledge cigar manufacturers of any note make "Normanda" packings. For instance, Isaac Harris, Boston; B. P. Clark & Co., Cambridgeport; P. La Francis, Cambridgeport; B. Spinoza, Boston; H. Mason, H. P. Wasserboehr, Henry Traiser, Allis & Fisher, Boston Co-operative Association, Waite & Bond, O. L. Gillett, all of Boston; George F. Slade, of Chelsea; Hirsch & Co., of New York, Lischtenstein Brothers, also of New York; and I know of others whose names I cannot remember—not being so well acquainted in New York as in Boston.

Isaac Harris makes "Normandie;" P. B. Clark makes "La Norma;" Charles B. Perkins, whom I have not mentioned, makes "Noriega;" Waite & Bond makes "Norman;" Spinoza makes "Normanda;" Boston Co-operative Association makes "La Norma;" Henry Traiser makes "Harvard;" Wasserboehr makes "H. P. W.;" P. La Francis makes "Normanda;" Charles W. Wilder makes "La Norma;" N. Samuel calls them "N. S."

(Question and answer objected to — immaterial and irresponsive.)

15. For how long have you known these cigars thus packed and named in the American market?

Ans. I have personally known them in the market for the past nineteen years.

16. Did or not Hyams continue to make and sell the "Normanda" brand of which you have testified, during the time that you were with him?

Ans. He continued the sale of the cigars during my stay in his employ.

215 Cross-examination by Mr. HALE, counsel for complainants:

X 17. During what years did you work for Hyams?

Ans. 1867, '68, and '69.

X 18. What part of the cigar trade did you pursue during that time?

Ans. Making cigars and selling them.

X 19. Did you make "Normanda" cigars?

Ans. I did not.

X 20. Were they made by Hyams while you were employed by him?

Ans. Yes, sir.

X 21. Did you know a brand of cigars at that time called "Normandi" or "La Normandi?"

Ans. No, sir.

X 22. When did you first hear of that brand?

Ans. Six years ago, or thereabouts.

X 23. Who has had charge of the sale of that brand in Boston since six years ago?

Ans. Estabrook & Eaton.

X 24. Did you ever know of a man by the name of Kingsbury, who had charge of that brand?

Ans. No, sir.

X 25. Have you ever dealt in that brand of cigars?

Ans. No, sir.

X 26. Do you know whether or not it has a large sale in Massachusetts and Maine?

(Objected to as incompetent.)

Ans. It has an ordinary sale.

X 27. Do you know where Hyams got his name of "Normanda" cigars?

Ans. I do not, as they were there when I came there.

X 28. When you sold the cigar for him, was that the first of your knowledge of the name "Normanda," of your own personal knowledge?

Ans. No, sir; I knew of the brand before.

216 X 29. When?

Ans. Some one or two years before.

X 30. How long had you been in the cigar business at that time?

Ans. My first entrance into the cigar business was when I went in with Hyams.

X 31. Then, you do not know from what the name "Normanda" came when you first heard of its being used in Boston?

Ans. No, sir.

X 32. As you had not been in the cigar business, you cannot tell whether the name "Normandi" or "La Normandi" had been applied to cigars in Boston for many years before that?

Ans. My personal knowledge is that there were "Normanda" cigars, but I don't know how the word was spelled, whether da, die, or any other way.

X 33. You do not know, of your personal knowledge, from whom Hyams got the name, how he derived it, or from whom he stole it?

Ans. No, sir.

JULIUS M. COHEN.

And said cause was again continued to the present term, when was passed and entered the following final decree:

Circuit Court of the United States, District of Maine.

MICHAEL STACHELBERG *et al. v.* ERNESTO PONCE.

SEPTEMBER 1, A. D. 1884.

This cause came on to be heard at this term upon the bill,
216½ answer, replication, and proofs, and was argued by counsel, and thereupon, upon consideration thereof—Colt, J.—

It was ordered, adjudged, and decreed as follows: That said bill be dismissed with costs, taxed at two hundred two dollars and fifty-one cents ($202.51).

By the court:

A. H. DAVIS, *Clerk.*

And on the 22nd day of April, A. D. eighteen hundred and eighty-four, is filed the following appeal:

United States Circuit Court, Maine District. September Term, 1884.
In Equity.

MICHAEL STACHELBERG and MOSES KIND, Complainants,
v.
ERNESTO PONCE.

To the honorable justices of said court:

And now come the said complainants and claim an appeal to the Supreme Court of the United States from the final decree
217 in the above cause and pray that this their appeal may be allowed, and that a transcript of the record and proceedings in the cause, duly authenticated, may be sent to the said Supreme Court, and that citation issue to said Ernesto Ponce; and said appellants, within sixty days after said decree, having filed the bond required by law, pray that all further proceedings may be superseded pending said appeal.

Portland, Me., April 20, 1884.

By their solicitor, CLARENCE HALE.

Allowed:
NATHAN WEBB,
District Judge.

And on the same day is filed the following bond:

Know all men by these presents that we, Michael Stachel-
218 berg and Moses Kind, both of the city, county, and State of New York, as principals, and George Milliken and Hollis B. Hill, both of Portland, in the county of Cumberland and State of Maine, as sureties, are held and firmly bound unto Ernesto Ponce, of Portland, in the county of Cumberland and State of Maine, in the full and just sum of three hundred dollars, to be paid to the said Ernesto

Ponce and to his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourteenth day of April, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately at a term of the United States circuit court within and for the district of Maine, begun and holden at said
219 Portland Sept. 23, 1884, in a suit depending in said court between said Michael Stachelberg and Moses Kind, complainants, in equity, and said Ernesto Ponce, defendant, a decree was rendered against the said Michael Stachelberg and Moses Kind and in in favor of said Ernesto Ponce, and the said Michael Stachelberg and Moses Kind having taken an appeal and filed a copy of the record of said case with said appeal in the clerk's office of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said Ernesto Ponce, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

220 Now, the condition of the above obligation is such that if the said Michael Stachelberg and Moses Kind shall pay the costs of suit heretofore accrued against them in said circuit court, unless said decree shall be reversed, and shall prosecute their said appeal to effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

MICHAEL STACHELBERG. [L. S.]
MOSES KIND. [L. S.]
GEORGE MILLIKIN. [L. S.]
HOLLIS B. HILL. [L. S.]

Signed and delivered in presence of—
CHARLES S. ROHMAN,
to M. S. and M. K.
GEO. L. HODGDON,
to G. M. and H. B. H.

Approved by—
NATHAN WEBB,
District Judge.

221 *Authentication.*

Circuit Court of the United States, District of Maine.

I, A. H. Davis, clerk of the circuit court of the United States for the district of Maine, do hereby certify that the foregoing printed and written pages (1 to 220, incl.) are a full, true, and perfect transcript of the record and proceedings in the cause — Michael Stachelberg *et al. v.* Ernesto Ponce therein named, as the same appears of record and on file in my office.

Witness my hand and the seal of said court this 20th day of July, A. D. 1885.

[Seal of the Circuit Court, Maine.]

A. H. DAVIS, *Clerk.*

222 *Opinion of the Court. Filed February* 23, 1885.

Circuit Court of the United States, District of Maine. In Equity.

MICHAEL STACHELBERG *et al.*
v.
ERNESTO PONCE. } No. 308.

COLT, *J.*:

In this suit the complainants claim the exclusive right to the use of the trade-mark "La Normandi" or "Normandi," which is applied to a brand of cigars, and charge the defendant with infringement in using the words "E. P. Normanda" or "Normanda" or "Normandie" upon a brand of cigars made and sold by him.

The complainant Stachelberg obtained, by assignment from one Asher Bijur, of New York, the exclusive right to use this
223 trade-mark, and he subsequently conveyed the right to the firm of Stachelberg & Co., the complainants. It appears that Bijur was the originator of the trade-mark and had used it for some years, building up quite an extensive sale for this brand of cigars by reason of their good quality. The original trade-mark bore the name of the maker, "A. Bijur," and also the initials "A. B." Upon the assignment of the trade-mark to Stachelberg he substituted his own name, "M. Stachelberg," and the initials "M. S." In this form the trade-mark was registered by Stachelberg & Co. in 1876, under the United States law, which has since been declared unconstitutional. Trade-Mark Cases, 100 U. S., 82. In this case, therefore, the complainants stand on their common-law rights.

The defendant denies the charge of infringement and rests his defence on various grounds. Whatever may be thought of the remaining defences, there is one point which we think is well taken and therefore fatal to any relief prayed for in the bill. In the use of the trade-mark the complainants do not state that it was obtained by assignment or purchase from A. Bijur. Bijur originated the the trade-mark and it thus became a sign of the quality of the artitle he sold and an assurance to the public that it was the genuine product of his manufacture. A trade-mark must, either by itself or by association, point distinctively to the origin or ownership of the article to which it is applied. Canal Company *v.* Clark, 13 Wall., 311. It imports that the article is made by the original proprietor and therefore genuine, and the law protects the original pro-
224 prietor, not only as a matter of justice but to prevent imposition on the public. Manhattan Medicine Co. *v.* Wood, 108 U. S., 218.

Now, in order that the public may not be deceived, it is essential that an assignee or purchaser of the original proprietor should indi-

cate in the use of the trade-mark that he is assignee or purchaser. Sherwood *v.* Andrews, 5 Am. L. Reg., N. S., 588. Otherwise, the public are misled into purchasing the goods of another manufacturer or vendor as those of the original proprietor.

If these complainants have any right of action against the defendant it is upon the ground that by copying the trade-mark "La Normandi" in substance he is misleading the public by false representations into the purchase of his cigars as those made by A. Bijur, the original proprietor of the trade-mark. Canal Company *v.* Clark, *supra.* And so these complainants, in failing to give notice that they are the purchasers and assignees of the trade-mark from A. Bijur, are practicing the same deception towards the public which they charge against the defendant. The fact that the name "M. Stachelberg" is attached to the trade-mark can no more relieve the complainants of the charge of misrepresentation as to the public than the use of the name "E. Ponce" or "E. P." can relieve the defendant of such a charge. It is the use of the fanciful words La Normandi, or words of substantial similarity, that is calculated to mislead.

The supreme court, in Manhattan Medicine Co. *v.* Wood,
225 *supra*, declare that the object of a trade-mark being to indicate by its meaning and association the origin or ownership of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use; otherwise a deception would be practiced upon the public and the very fraud accomplished to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer.

Under the rule laid down in Manhattan Medicine Co. *v.* Wood the complainants have no standing in a court of equity, and the bill must be dismissed.

Bill dismissed.

A true copy.

[Seal of the Circuit Court, Maine.]

Attest: A. H. DAVIS, *Clerk.*

226 The United States of America to Ernesto Ponce, of Portland, in the district of Maine, and a citizen of said State of Maine, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Maine, wherein Michael Stachenberg and Moses Kind, both of the city, county, and State of New York, and citizens of said State of New York, copartners doing business in said city under the name and style of M. Stachelberg & Company, are appellants, and you are defendant, to show cause, if any there be, why the decree rendered against the said appellants, as in the said appeal mentioned,

should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Le Baron B. Colt, circuit judge for the first judicial circuit, this 20th day of April, in the year of our Lord one thousand eight hundred and eighty-five.

LE BARON B. COLT,
U. S. Cir. Judge.

227 [Endorsed:] Stachelberg *et al. v.* Ponce. Citation.
[Stamped:] Maine district, *ss:* Office clerk C. C. U. S. Rec'd and filed April 22, 1885. Attest: A. H. Davis, clerk.

On this — day of ——, in the year of our Lord one thousand eight hundred and eighty-—, personally appeared —— —— before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the —. A. D. 188–.

—— ——.

UNITED STATES OF AMERICA, *Maine District,* } *ss:*

JULY 10, A. D. 1885.

I have this day made service of the within citation by giving in hand to the within-named Ernesto Ponce an attested copy of the same.

GEORGE D. BISBEE,
U. S. Marshal.

Fees:

Service	$2 00
Travel	06
Copy	1 00
	$3 06

Endorsed on cover: Maine C. C. U. S. No. 311. Michael Stachelberg & Moses Kind, copartners as Stachelberg & Company, appellants, *vs.* Ernesto Ponce. Filed September 28, 1885.

Supreme Court of the United States,

OCTOBER TERM, 1888.

No. 51.

MICHAEL STACHELBERG ET AL.,

Appellants,

vs.

ERNESTO PONCE,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

BRIEF OF ARGUMENT FOR APPELLANTS.

BURGOYNE QUICK PRINTING CO., COR. WALKER & CENTRE, N. Y.

Supreme Court of the United States.

MICHAEL STACHELBERG ET AL., Appellants, vs. ERNESTO PONCE, Appellee.	October Term, 1888. No. 51.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is a trade-mark case. It is brought here by appeal from a decree of the Circuit Court of the United States for the District of Maine, entered in pursuance of an opinion by Judge Colt (Record, 141). The bill was filed December 30, 1882; the answer February 6, 1883, and a replication thereafter. Proofs were taken by both parties, and the cause was heard by his Honor Judge COLT, and a final decree entered September 1, 1884 (139), dismissing the bill of complaint.

The reason assigned for dismissing the bill had not been specifically raised by the answer.

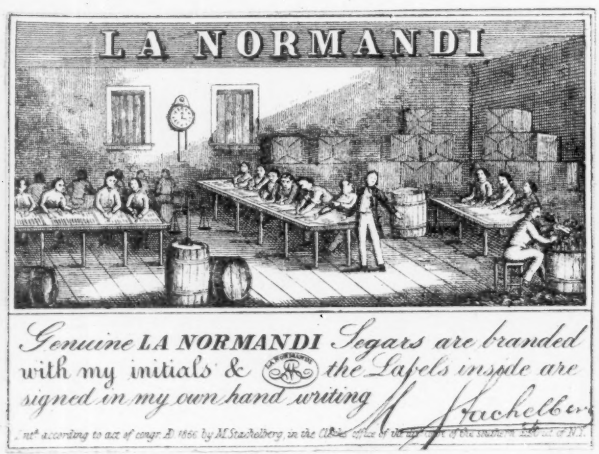
The bill was filed to protect the use by the complainants of the designation "LA NORMANDI" as a trade-mark or trade-name for cigars.

The trade-mark was originated by one Bijur, and was by him used as a part of a label, the label consisting of the trade-

mark "LA NORMANDI," a picture of the interior of a cigar factory, and a *fac-simile* of a signature, "A. Bijur," together with the initials "A. B."

The Court below found that the complainant Stachelberg obtained by assignment from Bijur the exclusive right to use Bijur's label, which right was assigned by him to the complainants Stachelberg & Co., and that, upon the assignment to Stachelberg, he substituted his own name, "M. Stachelberg," for that of Bijur, and added his initials, "M. S."

The following is a specimen of the label as used by the complainants. Bijur's label was exactly like it, except that it bore a *fac-simile* of his signature and his initials:



The Court below held that the bill should be dismissed because the complainants' label failed to give notice that they were the assignees of Bijur, and that the label as used by them was in effect a fraudulent misrepresentation that cigars which were made by Stachelberg & Co. were cigars made by their assignor, Bijur (141).

No other defenses were discussed in the opinion.

The proofs show that Bijur, a manufacturer of cigars at New York (Record, page 11, folio 18), and subsequently a dealer in leaf tobacco (*Ib.*), originated the "LA NORMANDI" cigar in 1856 or 1857 (page 26, folio 41), and manufactured and sold it in large quantities until 1864, or about that year (page 32, folio 50), when he gave up manufacturing (*Ib.*).

In 1865 or 1866, at which time he was a dealer in leaf tobacco (page 34, folio 52), Bijur had an understanding with Stachelberg, in pursuance of which Bijur instructed Stachelberg in the manufacture of the brand (page 33, folio 51; page 34, Ints. 48 to 52; page 16, Ints. 84, 88; page 20, Ints. 163, 164), supervising the selection of materials for a number of years (page 34, Int. 48 *et seq.*), testing both the raw material and completed goods and generally assisting in making known to Stachelberg how the "LA NORMANDI" cigar had been produced.

"Bijur was in the factory two or three hours every day, and he saw the cigars put up. He examined them. He smoked them and he brought us customers for them. * * * I (Stachelberg) manufactured them from the same materials as Mr. Bijur, and under his advice, and all who tried the cigars, and all who tried the tobacco, declared it to be the same material as Mr. Bijur used. I let him try the cigars himself and I also let him try the tobacco" (page 16).

Bijur also made over the good-will connected with the business of making and selling the cigar (page 20, Int. 164; page

33, folio 51 ; page 13, Ints. 49, 50, 51), and in many ways assisted in promoting the affairs of his successor.

The Court below found that : " The complainant Stachelberg obtained by assignment from one Asher Bijur, of New York, the exclusive right to use this trade-mark (" La Normandi "), and he subsequently conveyed the right to the firm of Stachelberg & Co., the complainants " (page 141, folio 223).

Having acquired the rights of Bijur in the premises, Stachelberg made use of the label which had been used by Bijur, but *substituted his name for that of Bijur wherever it occurred, with the result that it was impossible to make an inspection of a package of the goods without the name Stachelberg meeting the eye as that of the manufacturer.*

The evidence leaves no room foı doubt,

(1) That the " LA NORMANDI " cigar, as produced by its originator, Bijur, was an article having a well-defined individuality.

(2) That its originator, Bijur, instructed the complainant Stachelberg very carefully and fully, as to all its peculiarities and as to all the things done by him, Bijur, in connection with its manufacture, so that its individuality and characteristics were preserved and perpetuated.

(3) That its originator Bijur assigned the business of making it, together with the good-will thereof, and the exclusive right to use the name " La Normandi " to the complainant Stachelberg, by whom it was conveyed to Stachelberg & Co., the complainants, and that the individuality and distinguishing characteristics of the original article have continued to be preserved by the complainants.

We submit that, upon these facts, it must be held that the conveyance of the trade-mark by Bijur to Stachelberg was regular and effectual ; that the complainants have a valid title, and that the label sought to be protected is, in every way, lawful.

Evidence tending to show that the term "LA NORMANDI" was not originated by Bijur was produced by the defendants.

The Court below states, however, as distinctly as possible, that Bijur originated the trade-mark, and that he assigned it to the complainant Stachelberg, by whom it was conveyed to the complainants. The evidence bearing upon this point is discussed in an appendix to this brief, to which attention is respectfully directed.

Our understanding is that the Court below entertained no doubt, except as to the question of misrepresentation.

Assignment of Errors.

1. The Court below erred in holding that the label in question is fraudulent because it does not disclose that the goods in connection with which it is used are manufactured by the assignor of the person by whom it was originated.

The decision should have been that, inasmuch as the complainants had acquired the business of their assignor, and were carrying on the business once carried on by him, and were actually producing, successfully and in good faith, the cigar which had come to be known as the "LA NORMANDI CIGAR," *the substitution of their name for that of their assignor was a reasonable and sufficient compliance with the policy of the law.*

2. The Court below erred in not deciding that the complainants were the lawful owners of the trade-mark involved and entitled to the relief prayed for in the bill of complaint.

Brief of Argument.

The opinion of the learned Judge who heard the case in the Court below is made to rest upon the rule of *Manhattan Medicine Co. vs. Wood*, 108 U. S., 218.

There is no doubt that the doctrine of that case was not intended to affect the doctrine of *Kidd vs. Johnson*, 100 U. S., 617. The trade-mark or brand involved in the earlier case was "S. N. PIKE'S MAGNOLIA WHISKEY, CINCINNATI, OHIO." This mark or name was used and given reputation by the firm of S. N. Pike & Co., and was by them sold, with their distillery, to the appellees, Mills, Johnson & Co. The Court held that the use by Mills, Johnson & Co. of the designation "S. N. PIKE'S *Magnolia Whiskey*," upon goods made by them was not a misrepresentation, but was a lawful use of a valid trade-mark.

The Court say:

> "As to the right of Pike to dispose of his trade-mark, *in* "*connection with the establishment where the liquor was* "*manufactured*, we do not think there can be any reason- "able doubt. It is true the primary object of a trade- "mark is to indicate by its meaning or association the ori- "gin of the article to which it is affixed; but when the "trade-mark is affixed to articles manufactured at a par- "ticular establishment, * * * and that establishment "is transferred to others, the right to the use of the trade- "mark may be lawfully transferred with it. Its subsequent "use by the person to whom the establishment is trans- "ferred is considered as only indicating that the goods to "which it is affixed are manufactured at the same place, "*and are of the same character as those to which the mark* "*was attached by its original designer*" (100 U. S., 620).

The reason why the transfer of a trade-mark is lawful when it is sold as an incident of a factory or business, is that the trade-

mark continues to mean what it formerly meant. Presumably the same processes and materials of the same kinds and qualities continue to be used, and the public get, when they rely upon the mark, what they have been accustomed to get and what they desire. "PIKE'S MAGNOLIA WHISKEY" meant not whiskey which was distilled in a particular building, and the exclusive right to make which was an incident of the ownership in the realty which passed with the fee, but whiskey which was distilled according to the methods of a particular establishment and which was the result of the skill of those who had originated and perfected it. When Mills, Johnson & Co. began to make it, its individuality and distinguishing characteristics remained undisturbed, because the new manufacturers continued, without change, the methods of their assignor, and the designation meant what it had meant when the article was actually made by Pike.

It would have been unfortunate if the conclusion in *Kidd* vs. *Johnson* had been different. The doctrine is that a manufacturer, who is continuing an established business and using therein brands which have been given reputation by his predecessor, will not be compelled to throw away the obviously valuable and important commercial advantages connected with their use. There are many brands and trade-marks, which symbolize the labor, enterprise and outlay of centuries; they denote a reputation and notoriety which have been acquired by constant exertion continued by different individuals for generations. It is impossible to say that these brands and marks and symbols of reputation cannot be transferred in connection with the business to which they relate.

The doctrine of *Kidd* vs. *Johnson* has been applied in numerous well-considered cases. The subject was very intelligently examined by the Supreme Judicial Court of Massachusetts in *Hoxie vs. Chaney*, decided in 1887. It appeared that one Chaney had in use the designation "A. M. HOXIE'S MIN-

ERAL SOAP," against whom the plaintiff, Hoxie, instituted a suit, contending that the use of his name, in the connection in which it occurred, made the trade-mark personal to himself and the assignment thereof invalid. The Court held that Chaney had a good title to the designation "A. M. HOXIE'S MINERAL SOAP," and that it was a lawful trade-mark.

> "There may no doubt," it is said, "be cases where the "personal skill of an operative or artisan may so far enter "into the value of a product that a trade-mark bearing "his name would, or at least might, imply that his personal "work or supervision was employed in the manufacture; "and in such cases it would be a fraud upon the public if "the trade-mark should be used by other persons, and for "this reason such a trade-mark would be held to be un- "assignable. It is in any case a question whether the use "of the trade-mark would give the public or purchasers a "false idea as to who made the article; and a court of "equity would not lend any active aid to sustain a claim "to a trade-mark which should contain a misrepresenta- "tion to the public (citing *Manhattan Medicine Co. vs.* "*Wood, supra*). But, on the other hand, the usages of "trade may be such that no such influence would naturally "be drawn from the use of a trade-mark which contains a "person's name and all that purchasers could reasonably "understand is *that the goods bearing the trade-mark are* "*of a certain standard, kind or quality, or are made in a* "*certain manner or after a particular formula by persons* "*who are carrying on the same business that formerly was* "*carried on by the person whose name is in the trade-mark*" (*143 Mass., 592*).

In *Russia Cement Co. vs. Page* (17 N. E. R., 304), decided by the same Court, the case of *Hoxie vs. Chaney* is commented upon and followed, the Court referring particularly to the fact

that the sale of the good-will of the business and of the "entire assets of the firm" was a conveyance of the brands and trade-marks.

The reasoning of *Kidd vs. Johnson* has been applied in another class of cases, in which there has been an assignment of a business, without reference to the place of manufacture.

Dixon Crucible Co. vs. Guggenheim, 2 Brews., 321, is an important case in which the subject is discussed at length, and which has been often cited and followed.

In *Filkins vs. Blackman*, 13 Blatch., 440, the label used by the complainant was the same as that of his assignor, except that it contained the words, "MANUFACTURED at ALBANY CITY BY DR. M. L. FILKINS & BROS."

It appeared that the complainant made a contract with one Blakeman to manufacture and sell an article which had acquired reputation under the name of "DR. J. BLAKEMAN'S GENUINE HEALING BALSAM." It was shown that the article had become well known, that a demand for it had been created and that it was made by the plaintiff substantially according to the original formula which was furnished by Blackman. The Court held that the contract was good, and that the use of the mark by Filkins was lawful.

> "If," say the Court in *Skinner vs. Oakes*, 10 Mo. App., 45 (Am. Trade-Mark Cases, Price & Steuart, p. 472), "we "could gather from the record that the plaintiffs are really "*carrying on the same business of manufacturing and sell-*"*ing the same goods* as Probasko & Oakes, we should have "no difficulty in holding that they are entitled to the re-"lief which the Court below awarded them."

To the same effect are the following cases:

Warren vs. Warren Thread Co., 134 Mass., 247;
Oakes vs. Tonsmierre, 4 Woods, 555;
Morgan vs. Rogers, 19 Fed. Rep., 596;

Burton vs. Straton, 12 Fed. Rep., 696;
Hegeman & Co. vs. Hegeman, 8 Daly (N. N.), 5, and cases cited.

It is easily deducible from these cases that the question in every instance is, as suggested in substance in *Kidd vs. Johnson*, whether the plaintiff is really carrying on the business of his assignor *so that the original meaning of the mark has been preserved, and so that the public, when they rely upon it, are not misled.*

In the present instance, the complainants established that they acquired, from the person who originated the brand, complete and definite knowledge as to all the details of the manufacture. The kinds and quality of the tobacco to be used, the manner of making the cigars and everything connected with its production, from first to last, was carefully made known to them. They were fully and intelligently instructed by the originator of the goods, and acquired, took up and continued the business, together with its good-will and other incidents, which had been established and carried on by him. The "La-Normandi" cigar continued to be the same cigar which it had always been. The name represented the results of the knowledge, skill and experience of the person who first made it. There was, in a just and accurate sense, a conveyance of exactly the things which would have been conveyed if the business had been carried on in a factory or building which had been sold with the trade-marks.

It follows, we submit, that the use by complainants of the mark "LA NORMANDI," in the manner in which they have used it, was lawful.

But the rule laid down in *Manhattan Medicine Co. vs. Wood*, is not less important than that of *Kidd vs. Johnson*. We submit that there is no conflict between the two cases, and that they are easily distinguished from each other.

In the latter case the substance of the label which was condemned was as follows:

"ATWOOD'S VEGETABLE

PHYSICAL JAUNDICE BITTERS.

Manufactured by Moses Atwood, Georgetown, Mass., and sold by his agents throughout the United States."

The proofs showed that the medicine was made by the Manhattan Medicine Company at New York; and it appeared that the only deduction from an examination of the article was that it was made by Moses Atwood, at Georgetown, Massachusetts. The label, therefore, contained two distinct falsehoods, and was unmistakably fraudulent and misleading.

> "As the medicine," say the Court, "was tried and "proved to be useful, it was sought for, * * * and "that purchasers might not be misled, it was always "accompanied with a label, showing *by whom* and *at what* "*place* it was prepared. These statements were deemed "important in promoting the use of the article and its "sale, or they would not have been continued by the "assignees of the original inventor. And yet they could "not be used with any honest purpose when both state- "ments had ceased to be true. *It is not honest to state that* "*a medicine is manufactured by Moses Atwood, at George-* "*town, Massachusetts, when it is manufactured by the Man-* "*hattan Medicine Co. in the City of New York*" (108 U. "S., 222).

There is no room for doubt that, if the label which was condemned had contained, instead of the words "manufactured by Moses Atwood, Georgetown, Mass.," a truthful statament as to the name of the manufacturer and his place of business, it would have been lawful within the rule laid down in *Filkins vs. Blackman, supra,* and numerous other cases. In this instance exactly the change which was necessary to make the label an honest one has, we submit, been made.

The Court below found, in effect, that the complainants were the assignees of the person who first used the trade-mark, but held that the label was unlawful, because it did not disclose the fact that Stachelberg was the assignee of Bijur. It is deducible from the opinion that, if the name Stachelberg had been followed by the word "assignee," the bill would not have been dismissed. We submit that a person who had a knowledge of Bijur's connection with the brand would look for the name "Bijur," and not finding it upon the label or package, and knowing that the manufacturer's name was attached to the goods, would necessarily conclude that the goods were made by the complainants. It seems to us that the fair and reasonable deduction from an examination of the goods would be that they were goods once made by Bijur, but now made by the complainants, which is exactly what all the rules permit.

There are important business considerations which stand in the way of the application of the word "Assignee" in connection with the name of a merchant or manufacturer. The necessary conclusion is that the person who uses the word is doing business as an assignee or agent. If the complainants made use of a sign or label reading as follows:

M. STACHELBERG & CO.,

ASSIGNEES,

there would be great danger of misconception and of injury to their credit and commercial reputation, while the fact that they

were the manufacturers of the goods would not be made more apparent.

In the present instance there is no false statement, actual or constructive. On the contrary, the statement is in substance, that the goods are manufactured by the complainants, and this fact is not only indicated by the fac-simile of the signature attached to the principal label, but is repeated in the application of complainants' initials and name upon other parts of the package. The most superficial examination discloses at once that the goods are the manufacture of the complainants. If the label and package had contained the representation that the goods were manufactured by Bijur, the label would have been nearer to that which was held to be fraudulent. In the case of *Manhattan Medicine Co. vs. Wood*, and cases which look in the same direction, the label contained a broad and distinct misrepresentation, that the goods were made by a person who did not make them. The use of the designation "Pike's Magnolia Whiskey" by Mills, Johnson & Co. in connection with the business once carried on by S. N. Pike was legitimate, but if there had been added to the brand the words "MANUFACTURED BY S. N. Pike," when the goods were manufactered by Mills, Johnson & Co., the case would have been nearer to that of *Manhattan Medicine Co. vs. Wood.*

We respectfully submit that the distinction between the two lines of decision, which may be said to be led respectively by *Kidd vs. Johnson* and *Manhattan Medicine Co. vs. Wood*, is easily understood. There is as little doubt that the label of the appellant is not of the same character as that which, in the latter case, was held to be unlawful.

The case of *Sherwood vs. Andrews*, decided by the Superior Court of Chicago, in 1866, and cited in the opinion of the Court below, was, we respectfully submit, as far as it may be an authority in the connection in which it is cited, overruled and rendered nugatory by the case of *Kidd vs. Johnson.* The

facts were to all the intents and purposes the same in both cases.

The case of *Fuller vs. Sellers*, 4 Brews., 42, is a later case decided by the Supreme Court of Pennsylvania, in which the opinion was written by Mr. Justice STRONG, and is directly to the contrary.

> " We do not think," the Court say, " the position ten-
> " able that the complainants are not entitled to relief, be-
> " cause they are only assignees of the trade-mark, and use
> " it without designating themselves assignees."

It has been repeatedly held that the right to use the trade-mark of the original proprietor passes with the good-will by operation of law to an executor or to the assignee of a bankrupt.

Hegeman & Co. vs. Hegeman, 8 Daly (N. Y.), 1.

It follows that if the mark is of such a nature that it can be made the subject of a lawful assignment, it passes with the sale of the good-will by the original proprietor.

G. & H. Manufg. Co. vs. Hall, 61 N. Y., 232.
Ainsworth vs. Walmesley, 44 L. J. R., 242.
McLean vs. Fleming, 96 U. S., 249, 250.
Russian Cement Co. vs. La Page, 17 N. E. R., 306, and cases cited.

That the mark here involved is of such a nature that it may be made the subject of an assignment in connection with the sale of the good-will of the business in which it has been used, admits of no doubt. The term " LA NORMANDI " is essentially a fanciful and arbitrary one, and not in itself of a personal nature. And it is made plain by the evidence that the complainants acquired from the originator of the " La Normandi " cigar such a knowledge of its peculiarities and the method of making it, that the meaning of the term " La Normandi " has never been disturbed.

The cigar when made by Stachelberg & Co. continued to be

the "La Normandi" cigar, exactly as was the case with "La Page's Glue," "Pike's Magnolia Whisky," "McLean's Liver Pills" (96 U. S., 245), "Blackman's Healing Balsam," and the many other articles, the manufacture of which by the assignees of their originators has been protected.

The label seems to us to be unmistakably true and honest. It says to the purchaser:

> *This is the genuine "La Normandi" Cigar; it is not made by Bijur, but by the person whose name and initials appear upon this label and the goods.*

We submit that the rights of the appellants in the premises may be made clear by inquiring whether they would have acquired a good title if the rights of Bijur in the premises had been extinguished in their favor by proceedings in bankruptcy. The authorities just cited leave no room for doubt that the good-will of the business of manufacturing the "La Normandi" cigar would have been an asset in the hands of the assignee in bankruptcy, and that the purchaser would have acquired a valid right to continue the manufacture of the "La Normamdi" cigar, and to use in connection therewith the designation "La Normandi." His right in the premises would be to represent to the exclusion of all others that he was producing the particular goods which had been produced by his assignor, and which had acquired reputation under a particular appellative. If he removed the name of his assignor from the goods and substituted his own name, he would, we submit, thereby completely discharge the duty which the policy of the law imposes upon him.

We submit that *Manhattan Medicine Co. vs. Wood* supports by implication the doctrine of *Kidd vs. Johnson* and that both of these cases and the many of a less authoritative character sustain the right of the appellants to be protected in their label.

2. The Court below erred in not deciding that the complainants were the lawful owners of the trade-mark here involved and entitled to the relief prayed for in the bill of complaint.

The language of the opinion indicates that the Court below entertained no doubt that Bijur originated the trade-mark and that his rights were made over to the complainants. We present in an appendix an analysis of the testimony, which, we submit, leaves no doubt that the defense of prior use was not made out.

It is shown that complainants had established a large and valuable business, and that the brand was one of the most valuable and important of its class. To be effectual, the evidence of prior use should be such as to leave no room for reasonable doubt. It is impossible to say that the testimony produced by the defendant is not on its face of doubtful probative force. If it establishes anything, it proves that the word "Normanda" was used as the name of a brand of cigars, and was well-known in the trade prior to its use by Bijur. We have shown beyond doubt, by calling a number of leading members of the trade, that there was no such brand in the market at the time the defendant's witnesses say it was well known. The proof of prior use is obviously too meager and uncertain to support a decree which shall operate to destroy the important interests which the bill seeks to maintain.

The infringement is too plain to admit of difference of opinion (*Celluloid Co. vs. Cellonite Co.*, 32 Fed. Rep., 94. Opinion by Mr. Justice BRADLEY).

Hier v. Abrahams 82 N. Y. 519.

We respectfully submit that the decree below should be reversed with costs.

ROWLAND COX,
Of Counsel for Appellants.

APPENDIX.

The proofs on the part of the complainants establish that their assignor had the mark in use as early as the year 1856 (Record, p. 26, fol. 41).

The first witness who testified as to the prior use was Ernesto Ponce, the defendant, who said that he manufactured a cigar which was called "NORMANDA" from 1861 to 1865 (*Ib.*, page 85). This evidence is immaterial except as it may tend to support that of other witnesses. He was unable, however, to give any testimony which sustains his statement.

The second witness is Lorenzo Bennet, the quality of whose testimony is easily understood (*Ib.*, page 92, fol. 144). He saw complainants' cigar, the price of which seemed to him to be too high, whereupon he "*immediately imitated the brand and used as a proper name the words 'La Normanda.'*" It also appeared that he had manufactured "Normanda" cigars for the defendant (*Ib.*, page 95, fol. 149).

The witness, Solomon M. Hyams, swears directly that he made a cigar called "LA NORMANDA" thirty years ago (*Ib.*, page 99) which would be as early as the year 1853. We direct attention to his cross-examination which discloses, we think, that his testimony, the relevancy of which depends upon the accuracy of a date, is on its face of questionable value.

He said that for several years he was in the habit of buying empty cigar boxes branded with the name "La Normanda" from "various saloons," which he refilled with cigars of his own manufacture and sold to the same class of customers (page 105, fol. 164). The "Normanda cigar" was a *very common* brand (page 104, Int. 75). He said he had a room "in Nassau street," "two very small rooms on the third floor." Asked the number in Nassau street, he answered, "I don't remember." Asked between what streets the building was situated, he answered, "I could not tell you; I don't remember; I am not well enough acquainted." He lived there, however, for eighteen months, during all the time he was in New York (page 102, fol. 160). He could not give the name of any one man of whom he bought a box (p. 103), nor was he able to mention any other particular of any kind.

"Cannot you remember," he was asked, "some person now living who knows that you were at that time selling 'La Normanda' cigars?" To which he answered, "I cannot" (p. 106).

At the time of giving his deposition, he was manufacturing a "La Normandie" (not La Normanda) cigars, put up in imitation of the complainants' goods, which he had been making, without their knowledge (page 74, fol. 115), since 1870 (p. 105, fol. 164).

David Fonseca, who was *in his wife's employ* (p. 114, fol. 178) says that he had the same experience as Hyams, whom he had known for forty years (p. 109, Int. 9). He said that "Normanda" cigars "were *a common cigar to be found in cigar stores generally*" (*Ib.* 109, Int. 14), twenty-six years ago, which would be in 1857. In another connection he said, "*Most all of*

the manufacturers in New York were putting them up" (p. 113, Int. 57), between 1855 and 1856 (page 112, Int. 47). Fonseca like Hyams was an infringer who was making a "La Normandie" (*Ib.* 114, fol. 178).

We think that the testimony of these witnesses establishes nothing except that they had from time to time made imitations of complainants' goods. There had been no acquiesence on the part of the complainants in these or any other infringements (p. 74, fol. 115 *et seq.*), and, if there had been, the fact would not prevent the issuance of an injunction (*McLean vs. Fleming*, 96 U. S., 245).

The substance of the proof of prior use is that the "NORMANDA" or "LA NORMANDA" cigar was well known in the New York market as early as 1857; that it was so common a brand that empty boxes could be purchased on application at saloons and restaurants and that "most all the manufacturers were putting it up." These statements are demonstrated to be untrue.

Mr. Nichols, of 79 Pine street, New York, had been a manufacturer of cigars in that city and familiar with the market since 1850, and never heard of a cigar called "Normanda" or "La Normanda" (p. 116).

Mr. Gershal, of 191 Pearl street, who was a cigar maker prior to 1856, and afterwards a dealer in tobacco in New York, never heard of a cigar called "Normanda" or "La Normanda" (p. 120, fol. 187).

Mr. Hamburger, of 151 Water street, New York, was in the habit of buying up old cigar boxes and cigar ribbons from 1850 to 1858, but never heard of a brand of cigars called "Normanda" or "La Normanda" (p. 123, fol. 192).

These witnesses are supported by Mr. Oppenheimer (p. 124), Mr. Hillburn (p. 126), Mr. Spingarn (p. 130) all of whom were merchants or manufacturers of high character, who had had a knowledge of the brands on sale in the New York market for many years and none of whom had ever heard of the "Normanda" cigar.

This indisputable proof on the part of the complainants precludes the acceptance of the loose, indefinite and arbitrary statements of the few infringers who appear as defendant's witnesses, and, we understand, explains the finding of the Court below that the brand was originated by Bijur.

Even if the testimony of the defendant, as to prior use, were accepted, the facts are insufficient to destroy the appellants right. The defendant says that he manufactured a "Narmanda" cigar from 1861 to 1865. Another witness says he bought empty boxes at various saloons in 1853, and another that he carried on the same kind of business in 1855 or 1856. We think the evidence of these witnesses is without probative force, but if it were accepted, it shows only that there was a fortuitous use of a similar name for a limited period and not such an use as created a well-defined title and reputation which was in existence when the appellants entered the market. It follows that the prior use sought to be shown would not, if established, affect the appellant's right.

Coleman vs. Crump, 70 N. Y., 580.
Blackwell vs. Dibrell, 3 Hughes, 151.
Holt vs. Menendez, 23 Fed. Rep., 870.
Browne on Trade Marks, §§ 674 to 691.

SUPREME COURT, U. S.

Appeal from the Circuit Court of the United States for the District of Maine.

MICHAEL STACHELBERG, et al., v. ERNESTO PONCE.

IN EQUITY.

BRIEF OF

WILLIAM HENRY CLIFFORD,

Counsel for Respondent. Appellee.

B. Thurston & Co., Printers, Portland.

SUPREME COURT, U. S.

Appeal from the U. S. Circuit Court for the District of Maine.

IN EQUITY.

MICHAEL STACHELBERG, ET AL.,

v.

ERNESTO PONCE.

BRIEF FOR RESPONDENT.

BILL IN EQUITY FOR THE ALLEGED VIOLATION BY RESPONDENT OF COMPLAINANTS' ALLEGED TRADE MARK ON CIGARS.

One A. Bijur is alleged to have commenced the use of the trade mark in 1858, and in 1865 to have assigned the right to the principal complainant. Then in 1873 the two complainants, Stachelberg and Kind, formed a co-partnership in the tobacco business, and in 1876 took out a registry of the alleged trade mark.

The pleadings set out a title derived by assignment from Asher Bijur. The trade mark is alleged to be the words, "La Normandi," or, "Normandi," alone. This is alleged to have acquired great value while it was the property of Bijur, the assignor of the complainants, as designating a brand of cigars made by him, from 1858 to 1865.

The trade mark set up in the bill is the words "La Normandi," or "Normandi," without the "La."

The bill states that the cigars under this trade mark were put up in boxes containing 250 each.

It is charged that the respondent infringes the rights of the assignee and of the partnership he has formed, by putting up cigars in boxes similar to those the complainants use, by putting the same number in a box, by tying the bunches in the same way, and by stamping the boxes with the words "E. P. Normanda."

The allegations of the bill are denied in the answer.

The respondent alleges three reasons why the bill of complaint should be dismissed: —

FIRST: THERE IS NO PROOF ON THE RECORD OF ANY ASSIGNMENT OF A TRADE MARK TO STACHELBERG BY ASHER BIJUR AS ALLEGED IN THE BILL.

SECOND: IF THE COMPLAINANTS HAD ANY TRADE MARK, THE RESPONDENT HAS NEITHER MISLED THE PUBLIC NOR TRESPASSED ON THE RIGHTS OF THE COMPLAINANTS BY HIS MODE OF PACKING OR LABELING HIS CIGARS.

THIRD: IF THE COMPLAINANTS HAD ANY TRADE MARK THEY HAVE NO STANDING IN AN EQUITY COURT TO SUE UNDER IT, BECAUSE, BEING ASSIGNEES, THEY HAVE USED THEIR MARK WITHOUT MAKING KNOWN TO THE PUBLIC THEIR TRUE RELATION TO THE MARK, AND THE GOODS DISTINGUISHED BY IT.

FIRST: THERE IS NO PROOF OF ANY ASSIGNMENT OF A TRADE MARK FROM ASHER BIJUR TO STACHELBERG.

The complainants' proof, in their opening case, not only does not sustain, but contradicts the allegations of their bill.

The bill alleges that Asher Bijur had a trade mark at common law on the words "La Normandi."

Record, p. 1, 3d ¶

The proofs show that he had no trade mark at all, but a copyright.

The following is the testimony of Michael Stachelberg, the principal complainant in the cause.

What was in reality assigned to Stachelberg, if anything, was a copyright.

X 225. Do you know whether Mr. Bijur had these words copyrighted or registered?
Ans. I don't know.

X 226. You never heard that he did?
Ans. I heard so; that he did.

X 227. Do you swear to that?
Ans. Yes, sir.

X 228. Was there any mention made of that in the assignment?
Ans. I think it was.

X 229. Have you any recollection on the subject at all?
Ans. I think a paper of that kind had been registered. He could not assign a copyright to me unless he had a copyright.

Complainants' Evidence, Record, p. 24.

The testimony of Isaac Bijur, brother and partner of Asher [and witness for complainants] is also to the same effect.

20. Otherwise the label was the same?

Ans. Yes, sir. But it was the principal thing to protect the name of "La Normandi," and therefore we gave that picture that name.

21. And you copyrighted it about that time?

Ans. My brother copyrighted it, because the factory was in my brother's name.

22. And he copyrighted in what year?

Ans. It must have been either in 1856 or 1857, somewhere along about that time.

Complainants' Evidence, Record, p. 32.

Asher Bijur is dead.

But the above is the testimony of his co-partner in business at the time the alleged assignment was made to the complainant, Stachelberg.

The bill should be dismissed because it alleges that the complainants have title to a trade mark at common law by assignment from Asher Bijur, but the proof is that if they ever got anything from Bijur, it was a copyright.

This was in 1865 or 1866.

But even this copyright was not taken out on the words "La Normandi" — [which are now claimed *alone* as the trade mark] but the copyright was on a picture combined with the words "La Normandi."

The testimony of the same witness, the original co-partner of Asher Bijur in 1858, explains this fully.

17. And he adopted that suggestion?

Ans. Yes, sir; he adopted that afterwards, and I will explain that, if you will allow me. When we wanted to adopt a new brand, we tried to find a

name suitable, but the name itself could not be registered. Therefore we had to produce a picture, and we had to give to that picture a name, and so it was registered and copyrighted. We suggested the picture and gave that picture the name of "La Normandi," so that it would be protected. The picture was printed to represent a table of cigar makers and some plants of tobacco. That was my suggestion. I had to do all the in-door work while my brother attended to all the out-door work, and therefore it came under my supervison to suggest the picture.

18. And this is the picture on Exhibit A?

Ans. Yes, sir; except that in the original "A. Bijur" appeared instead of "M. S."

Record. p. 81.

Same Witness Again.

X. 65. The trade mark of your brother, then, as I understand you, were the words "La Normandi"?

Ans. In connection with that picture.

X. 66. And the initials of your brother were added to indicate the origin or ownership of that trade mark?

Ans. No, sir. That was to show that the cigars were made by A. Bijur, to distinguish these cigars from any other imported cigars; to show that A. Bijur, of New York, made these cigars.

X. 67. Then the addition of those initials was to indicate the place where they were made, and the name of the owner of that trade mark, "La Normandi." Is that so?

Ans. No, sir.

X. 68. The trade mark, as I understand you, consists of the words "La Normandi," does it not?

Ans. Including the picture. That was the name of the picture; and the words "La Normandi," together with the picture, constitute the trade mark.

X. 69. What was the trade mark, the picture or "La Normandi"?

Ans. Both.

X. 70. The picture and the words "La Normandi" constituted the trade mark, if I understand you?

Ans. That constitutes the brand.

Thus it appears that even if the mark etc. appropriated by Asher Bijur had been a trade mark instead of a copyright, and

had been duly assigned to Stachelberg, it would not entitle him to claim a trade mark on the mere words "La Normandi" without the picture.

The alleged assignment is said to be lost.

Complainants endeavor to lay the foundation for the admission of secondary evidence of the contents of the assignment by proving its loss, and proper, but unsuccessful search in the proper places, in order to find it.

Record, p. 13, Ints. 38 to 48.
Record, p. 19, Ints. 139 to 162.

But it will be observed that this is search for the assignment of the old Bijur copyright, not an assignment of a common law trade mark, as the bill sets up, because there never was any such assignment.

The complainants endeavor to lay the foundation for the admission of secondary evidence relative to an alleged assignment of a trade mark at common law, by proving unsuccessful search after an assignment of a copyright.

Thus—

FIRST: THERE IS NO PROOF WHATEVER OF THE EXISTENCE OF ANY COMMON LAW TRADE MARK THE PROPERTY OF ASHER BIJUR.

SECOND: THERE IS NO PROOF WHATEVER OF ANY ASSIGNMENT TO THE COMPLAINANT, STACHELBERG, OF ANY SUCH TRADE MARK.

Consequently the complainants themselves have shown that they have no title to any trade mark on the words "La Normandi," as, and from, the assignor alleged in the bill.

The evidence above quoted and referred to, is all there is on the Record on this topic, and is wholly the evidence of the complainants.

It is submitted that they are bound by their own evidence.

The bill should therefore be dismissed for want of title in the complainants, to the alleged trade mark.

SECOND: IF THE COMPLAINANTS EVER HAD ANY TRADE MARK, THE RESPONDENT HAS NEITHER MISLED THE PUBLIC, NOR TRESPASSED ON THE RIGHTS OF THE COMPLAINANTS BY HIS MODE OF PACKING OR LABELING HIS CIGARS.

The complainants claim the word "La Normandi," as a trade mark on their boxes of cigars.

They pack their goods in boxes about three times as long as they are wide, they put 250 cigars in a box; they have ten bunches of twenty-five cigars each in a box.

The respondent uses the words "La Normanda," and packs his cigars also in the manner above described.

The cigars of the two parties are of about the same size.

They are tied up in bunches by a yellowish or brownish tape.

Complainants claim that "La Normanda," is a substantial appropriation of "La Normandi," and that the manner of packing his goods employed by the respondent, evidences an intent to appropriate the benefit of their mark, and sell his goods as and for those of the complainants.

The bill alleges that Bijur, the assignor of the complainants, used the method of packing above described when he acquired for the Normandi brand its reputation in the market.

The evidence from both sides clearly shows the elongated box with its 250 cigars, of the same dimensions as complainants, put up 25 in a bunch, with ten bunches in the box, was a method of packing cigars very old in the trade.

Eaton, Complainants' Witness.

X 72. Did you ever hear the word "La Norma," or "Norma" so applied?
Ans. Not to what was represented to be "La Normandi," but I have heard it applied to cigars.

X 73. How long ago?
Ans. I think as long as I have been in the business.

X 74. It is an old brand of cigars, is it not?
Ans. I think it is.

X 75. Were you ever acquainted, in the past, with a brand of "Normas" put up 250 in a box?
Ans. I have seen them.

X 76. Twenty-five in a bunch?
Ans. Yes, sir.

X 77. What kind of a ribbon?
Ans. As near as I can remember, several styles of ribbon.

X 78. Please enumerate the styles.
Ans. Plain yellow striped ribbon, and I think a red ribbon.

X 79. Chocolate stripe, or brown?
Ans. I should think it might be termed chocolate.

X 80. Where were they sold?
Ans. Principally from Boston.

X 81. Were they imported, or domestic?
Ans. Those put up quarter boxes were domestic. By quarter boxes I mean 250 in a box; *i.e.*, one one-quarter of a thousand. The imported, I think, have been put in two or more styles, including 100 and 250 in a box.
Record, page 68.

Same Witness.

X 122. "Norma" is an old name, is it not, as applied to cigars?
Ans. I think "La Norma" is.

X 123. "Normanda" is an old name as applied to cigars, is it not?
Ans. Only to a limited extent, and to domestic cigars.

X 124. Packing 250 in a box, 25 in a bunch, is an old method, is it not?
Ans. It is.

X 125. Tying up with a yellow ribbon, with a chocolate or brown stripe in it, is an old method, is it not?
Ans. It is.

Record, page 71.
See also same witness, Record, page 69, Ints. 84 to 100.

Mathias.

4. Please state where, when, and for how long a time?
Ans. In Portsmouth, N. H., and in Saco and Portland, Me. I was in Portsmouth, I think, about 1852 or 1853; in Saco about two years later, staying there about two years, and then I came to Portland, where I was in the cigar business until about sixteen years ago.

5. While you were in the business in Portsmouth, Saco and Portland, did you know of or deal in a brand of cigars called "La Norma"?
Ans. I did.

6. Please state about the size of the cigar, the size of the boxes, the number in a box, the number in a bunch, and how they were tied up.
Ans. The cigar was about five inches long, the box was of the size of Exhibit 1. There were ten bunches of twenty-five cigars each in a box, and the bunches were tied with one ribbon in the middle.

7. Please state the colors of the ribbon.
Ans. A blue ribbon with a chocolate stripe in the middle.

8. Were the words "La Norma" stamped on the boxes?
Ans. They were.

9. You dealt in those while in Portsmouth?
Ans. Yes, but not in Saco or Portland.

Record, page 106.

The respondent, Ponce, testifies that "La Normanda" was a common brand in Cuba in 1860, and that cigars of that mark were sold there and sent to the United States

28. Did you make and sell any cigars of the brand of "Normanda," in Cuba?
Ans. Yes, sir.

29. How many years ago?
Ans. About twenty-three years ago, at Havana.

30. Did you know of any one else that made them in Havana or in Cuba?
Ans. My brother and I made them — and other parties made them there before we did.

31. Who were the other parties, and about how long ago did they make them?
Ans. A man by the name of Martinez, I knew to have made them. It was a common brand — anybody could make them.

32. To whom did you and your brother sell your "Normanda" cigars?
Ans. Sold them everywhere — in the city — to sea-captains, and to agents who took them to the United States and to Europe.

Record, page 82.

And in this I submit he is corroborated by Isaac Bijur, the complainant's witness, a brother and partner of Asher, at the time he — Asher — is said to have first adopted the "Normandi" brand.

Isaac Bijur says, explaining why the initials of his brother were used in connection with the word "La Normandi," as follows:—

X 71. Then there were added the initials of your brother to indicate the ownership and the place where the cigars were made?
Ans. I suppose so.

X 72. Don't you know?

Ans. I cannot tell you, because that was a later thought; and the name was added so as to distinguish that from an imported cigar, or so that no imported cigar should come under that name.

Record, page 35.

This evidence refers to a date about 1858, and the respondent's evidence above says 1860.

Also Record, p. 108, Ints. 2 to 8.

It is thus shown that the method of packing, the kind of box, the bunches, and the number in the box, and the size of the cigars, are all old in the cigar business.

If, then, the respondent merely employs an old method of packing his cigars — one older than the commencement of complainant's use of it — surely no presumption of a design to mislead the public into a belief that he is selling complainants' goods can arise from this act.

But not only is the mode of packing used by the respondent, old in the cigar business, but the word "Normanda," which he employs as his brand, is proved to have been a common one for years before Bijur is alleged to have got up his word "La Normandi," and many years before he is said to have assigned to complainants.

Bijur is alleged to have got up the words "La Normandi" in 1858.

He is alleged to have assigned to complainants in 1865.

I now call attention to some of the evidence showing the age in the cigar business of the words "La Normanda" used by respondent.

1. What is your name, age, residence and business?

Ans. Solomon M. Hyams, of the firm of Hyams Brothers; 50 years old; Boston, Mass.; cigar manufacturer and tobacconist; place of business, 716 Washington street.

2. How long have you been connected in any way with the cigar and tobacco business, or either?

Ans. Since I was 14 years of age.

3. Were you ever connected with the business in New York? And if so, how many years ago?

Ans. Yes; thirty years ago.

4. At that time what was the nature of your connection with the cigar business?

Ans. I was a journeyman cigar maker.

5. Will you please give the place where you were employed?

Ans. I worked for Bijur Brothers, Schubarts & Hoffman, and for a man who was called "Havana Cohen."

6. At this time, about thirty years ago, were you or not acquainted with a brand of cigars called "Normanda"?

Ans. I was — a brand called "La Normanda."

7. In what market were they sold?

Ans. In the city of New York.

8. Please state whether the sale was a limited or an extensive one?

Ans. I should say that it was quite an extensive one, for the reason that I used to work in the shop in the day-time and work at home nights for myself, and buy these boxes from the parties that used them, and refilled them for myself and sold them as "La Normanda" cigars.

9. For how long a time, as nearly as you can remember, were you thus acquainted with this brand "La Normanda"?

Ans. Ever since.

10. The last syllable of the word was *da?*

Ans. Yes, sir.

11. How many cigars were usually put in a box, how many in a bunch, and with what kind of band were the bunches tied?

Ans. 250 in a box; 25 in a bunch; tied with cotton tape, yellow, with chocolate or brown center — some had a lighter color or shade of brown.

12. How long was the cigar?
Ans. Five-inch cigar.

13. Are you acquainted with a brand of cigars in existence at present, called "La Normandi," sold by Estabrook & Eaton in Boston?
Ans. I am.

14. What was the difference between those "La Normanda" cigars, their size, manner of packing, and the general shape of the boxes, and this recent cigar of Estabrook & Eaton's?
Ans. The size of the cigar was about the same; the box, of course, would be the same; the only difference that I know was that the word "La Normandi" is written or stamped on the ribbon or band; and possibly the initials of the parties making them were stamped on the box — otherwise, to all appearance, they were the same.

15. The Estabrook & Eaton cigars have the letters "M. S." branded on the outside of the box, do they not?
Ans. I am not positive.

16. Can you state who was the manufacturer of this "La Normanda" brand at the time of which you speak?
Ans. I cannot; for the reason that manufacturers at that time did not put their names on the boxes — now they put their names on the boxes, and it is brought to our attention.

17. For whom were you working when you made these cigars under this name, and packed them in this style on your own account?
Ans. For Bijur.

18. How long did you remain in New York after the time of which you have spoken?
Ans. About two years.

19. Did these "La Normanda" cigars continue in the market during that time until you left?
Ans. Yes, and have ever since.

20. They were not made by Mr. Bijur during the time you worked for him, were they?
Ans. No, sir. I don't think he was making either kind at that time.

21. I suppose you, at that time, bought the boxes that had once been used, because you could get them cheaper than new ones?
Ans. Yes.

22. Please give an estimate — not, of course, an accurate one — of the amount that you yourself made on your own account, having "La Normanda" stamped on them.

Ans. I made about three thousand a month for about eighteen months.

23. Did you ever know of an imported brand of "Normanda" cigars or "La Normanda"?

Ans. I never saw or heard of any.

24. Did you move from New York to Boston?

Ans. No. I have been in Boston since 1867.

25. Please state if you have, from time to time, since the thirty years ago or so when you were in New York, made and sold any of this brand of "La Normanda" in your business.

Ans. I have.

26. Then you were in New York about the years '53 and '54?

Ans. Between those years.

27. Please state in a general way, as nearly as you can, how commonly you saw the "La Normanda" cigars in places where they were usually sold.

Ans. In quite a number of places.

Record, page 99, Ints. 6 to 30.

This is corroborated by Cohen as follows: —

2. How long have you been engaged in the cigar business?

Ans. Seventeen years.

3. With whom did you work when you first entered into the cigar business?

Ans. With S. M. Hyams.

4. Where did you so work, and for how long a time?

Ans. Hanover street, Boston; the number I do not remember, but the store was under the Blackstone House. I worked there from two and one-half to three years.

5. What did you do while thus employed by Hyams?

Ans. I made cigars and retailed cigars at said store.

6. Do you remember of making and selling, or either, of a brand of cigars called "Normanda," while in Hyams' employ?

Ans. Yes, sir.

7. State whether you found such a brand of cigars on sale in the shop when you began to work there.

Ans. I did.

8. Please describe how the cigars were put up, how many in a bunch, how many in a box, the shape of the boxes and the bands which tied up the bunches.

Ans. The cigars were put up in an oblong box, containing 250 cigars, packed in bundles of 25, tied with ribbons printed on "Normanda."

9. Look at the box now shown you, Respondent's Exhibit C, and state whether the boxes used in Hyams' store at that time were similar or unlike this one in shape.

Ans. The same as this in shape.

10. Was or not the word "Normanda" in some way imprinted on the outside of the boxes?

Ans. On the cover of the box.

11. Please give the name, if any, which this store carried, and state on what the name was printed.

Ans. He called the store "Depot for Normanda Cigars"; and this was printed on our business cards.

12. How much of a sale was there for these "Normanda" cigars while you were there?

Ans. I never took any account of stock of the sales of the store; but the "Normanda" cigars were our leading and principal cigar that we were selling.

13. What was the color of the ribbons by which the bundles were tied?

Ans. A regular "Normanda" ribbon — a woven ribbon, with yellow borders and a dark brown center, and in the center of that another yellow line, made of cotton.

Record, page 212.

See also

Record, p. 92, Ints. 4 to 8.
Record, p. 97, Ints. 21 to 26.
Record, p. 109, Ints. 12 to 14.

The testimony of these witnesses is not contradicted.

The complainants have introduced six witnesses—between pp. 116 and 134 of the Record—who say they have never become acquainted with the "Normanda" brand, and this is all the countervailing evidence that is offered.

It amounts only to this, that these parties do not now remember of knowing a brand of cigars called "La Normanda" in 1853, when our witnesses *do* remember such a brand.

I therefore submit that the respondent has proved that packing cigars about five inches in length, in a long box, twenty-five in a bunch and ten bunches in a box, is older in the cigar trade than the alleged origin of the "Normandi" brand.

I submit we have shown that this was used with the brand "La Norma,"—the same word as "Normanda," both meaning a Norman female—long before "Normandi."

We have also shown that "La Normanda"—respondent's brand—was also used commonly in this country with exactly the same method of packing, and the same kind of cigars as those of complainants.

Then can the complainants sustain their charge of violation of whatever right they may have—if any?

Because in 1858 they adopted "Normandi" in combination with a certain way of packing as a trade mark, can they maintain a suit against us for using "Normanda" and the same way

of packing, when the name "Normanda" and the mode of packing were known in the cigar trade five years before their "Normandi" was in existence?

It is hardly necessary to say that no man can appropriate to himself, as a trade mark on his manufacture, any word or symbol in common use as a designation of a class of the same kind of goods.

Singer Manuf. Co. v. Stanage 6 F. 282.

If "Normanda,"—the word employed by Ponce,—is old in the cigar trade, to designate a certain kind of cigars, then these complainants cannot prevent his using it with such a kind of manufactured article.

Sherwood v. Andrews 5 Am. L. Reg. N.S. 588

It is a right belonging to the public and cannot be taken away from the public by any person or persons.

This is exactly the state of facts in this case.

The word "Normanda," such as used by the respondent, is an old and common mark or designation for the kind and make of cigars he puts up. It is older than the word "Normandi," in such connection.

In re, Hyde, Seb. Dig. 361.
In re, Hall & Co., Seb. Dig. 363.
McLean v. Fleming, [redacted] 96
Canal Co. v. Clark, 13 Wall. 322.

The method of packing complainants' cigars is one used with a great variety of brands.

Record, p. 137, Int. 14.

The respondent's acts evince no design to pass off his goods as those of the complainant, when they are viewed in the light of the above facts.

See also

Record, p. 92, Ints. 4 to 8.
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The method of packing complainants' cigars is one used with a great variety of brands.

Record, p. 137, Int. 14.

The respondent's acts evince no design to pass off his goods as those of the complainant, when they are viewed in the light of the above facts.

The respondent always marks his cigar boxes with his name or initials.

34. Have you ever sold in this country a box of the "Normanda" cigars, without putting on to it "E. P." or "E. Ponce"?
Ans. No, sir.

35. What have you printed on the caution label?
Ans. E. Ponce, Proprietor.
Record, page 82.

Complainants do not deny this.

BOSTON, April 10, 1882.

MR. E. PONCE:

Dear Sir:—Your advertisement and use of the name E. Ponce's Normanda cigars, is an infringement of our trade mark, for which we shall hold you accountable, unless its use is discontinued at once.

Yours respectfully,
ESTABROOK & EATON.

By their attorney, Godfrey Morse, per J. E. L.

See also pp. 88 and 89 of the Record, Int. 121.

The respondent's advertisements and marks on his boxes, clearly show the origin, and manufacture, and place of manufacture of his goods.

He does not advertise them as Stachelberg & Co.'s cigars, or as made in New York, but by E. Ponce, Portland, Maine.

There is here not only no attempt to pass off his goods as those of another, but no possibility of it. And it is only on this ground that chancery interposes to protect the complainant under an alleged trade-mark right.

McLean v. Fleming, ~~96 U. S. 245~~. 96 U. S. 245
Canal Co. v. Clark, *13 Wall. 322.*

The respondent's cigars do not deceive anybody.

Record, p. 56, Ints. 11 to 26.
Record, p. 57, Ints. 33 to 37.
Record, p. 60, Int. 57.
Record, p. 61, Ints. 13 to 20.

No evidence is introduced to show they ever *did* deceive any one, or to prove a purchase of the defendant's cigars under the belief that they were those of complainants.

The respondent openly announces his cigars to be "Normanda," E. Ponce, or "E. Ponce, Normanda."

No argument can be drawn from the similarity of the two words "Normand*a*" and "Normand*i*."

Hardy v. Cutter, 3 *Off. Gaz.* 68.

When a person selects a geographical name as a trade mark, he must take it with all its faults. If it sounds like other geographical names or like some proper name, that is the misfortune of the word he has taken. It does not entitle him to cover all words in the same language, of whatever signification, merely because they sound or are spelled somewhat like the one he happens to have chosen.

The evidence not only shows that "Normandi" has no effect to indicate the manufacture of Stachelberg, but does show that as these cigars are advertised in New England, the word is associated with a wholly different firm and by their own act.

So, if any suit could be maintained in this circuit it must be in the name of Esterbrook & Eaton.

Record, p. 63, Int. 11.
Record, p. 66, Ints. 41 to 42.
Record, p. 66, Ints. 51 to 55.

It is essential to a lawful trade mark, that it shows the origin and manufacture of the goods in some way.

Upton, Trade Marks, 136.
Canal Co. v. Clark, 13 Wall., 322.

This is in order that the buyer trusting in such or such a particular manufacturer, buys his goods from preference, and is assured that he is buying such manufacturer's goods by seeing the trade mark on them. This is the benefit to the purchaser.

Leather Cloth Co. v. Am. Leather Co., 11 Jur., U. S. 513. [*Cox Am. Trade Mark Cases 699.*]

The manufacturer thus secures and retains his trade by reason of his trade mark being affixed to the articles he makes. People seeing his mark denoting his manufactory, buy his goods on the assurance it affords them. Thus it becomes of value to him.

Manhattan Med. Co. v. Wood, 108 U. S. 223.

If any one imitates that trade mark so as to sell his own goods *as and for* the goods of the one possessed of the trade mark, then he takes his property without right, and so is liable to the lawful owner of the trade mark.

Upton on Trade Marks, p. 22.

Leather Cloth Co. v. Am. L. Cloth Co., American Trade Mark Cases (Cox) 698.

Its appearance on the goods is merely the assurance that these are goods of a certain man's make, and therefore of a certain quality.

Manhattan Med. Co. v. Wood, 108 U. S. 223.

Now the defendant has not been attempting to pass off his cigars as those of Stachelberg.

On the contrary he announces and advertises them as quite different. Witness his advertisements: —

BEST BARGAINS EVER OFFERED IN THIS CITY!

Anybody intending to make Presents, it will pay them to get E. Ponce's prices on Meerschaum Pipes and Smokers' Articles in general. The Largest and Best Selected Stock in the city at the Lowest Prices. There is nothing which would be more acceptable to a gentleman than a Box of his Celebrated

"E. P." NORMANDA CIGARS,

(the best Cigar in the market for the money).

I still manufacture them, and shall continue to, as their popularity demands.

E. PONCE,

COR. EXCHANGE AND MIDDLE STS.,

OPP. POST OFFICE.

RESPONDENT'S EXHIBIT E, — A. H. D, EX'R.

ADVICE TO SMOKERS!

If you want to smoke the best 10 cent Cigar in Portland call for E. Ponce's Normanda — something new — made of the best long Havana Stock.
Canada Money and all foreign coins taken for full value in trade.

E. PONCE,

COR. MIDDLE AND EXCHANGE STS.,

AND 87 COMMERCIAL STREET, PORTLAND, ME.

Record, page 139.

I cite these authorities, and make these extracts from the evidence to show that, after all, there is no encroachment upon the rights of the complainants by the respondent.

He is not attempting to pass off his cigars as and for theirs. On the contrary, he advertises a distinct brand of cigars from complainants', and invites purchasers. It is impossible to truthfully say that with such advertisements any reasonably observant person could be mistaken in what he was buying when he bought a Ponce "Normanda."

In other words, Ponce, the respondent, only interferes with the complainants' New England business to that legitimate ex-

tent which the good quality of his cigars enables him to do, not by *simulating* their brand.

These complainants tried to combine "Normandi" with, and to make it signify cigars put up 250 in a box, 25 in a bunch, and tied with a chocolate-colored ribbon.

Finding, as they have, that this was all old and used with the "Norma" cigar, a cigar shaped exactly like theirs, they are now surely limited to the words "La Normandi," M. S., or Michael Stachelberg.

See Amendment to Bill, Record, p. 6.

In other words there is nothing new in their mode of packing.

Anybody has a right to put up cigars in this way.

They say their trade mark consists of the words "La Normadi," or "Normandi," without the "La."

I say it cannot consist of such word or words *alone*, and be a lawful trade mark.

It must have—being a purely fanciful name—something else to complete the legal requirements of a trade mark.

It must have some accompanying words to denote the *origin* or manufacture of the goods, or complainants must show that the words "La Normandi" have got to signify a manufacture by Stachelberg & Co. of this particular brand of cigars and become associated with their place of business.

Morrison v. Case, 2 Off. Gaz. 544.

McLean v. Flemming, ~~13 Off. Gaz. 913~~. 96 U.S. 245

This latter requirement complainants have wholly failed to meet in their evidence.

When the alleged assignor of the complainants used the words "La Normandi," he accompanied them with a picture and either Asher Bijur or A. B.

Record, p. 31, Ints. 15 to 21.
Record, p. 35, Ints. 65 to 69.
Record, p. 21. Ints. 172.

That was what he copyrighted.

A trade mark in order to be valid, must in some way show the *origin* and *ownership* of the goods to which it is attached.

Canal Co. v. Clark, 13 Wall. 322.

If they had not been assignees of a copyright and the complainants had clearly shown that "La Normandi" indicated to the trade Stachelberg & Co.'s place of business, and then them as the manufacturers of a certain kind of cigars, they would have established these words as their trade mark. But they have not done so at all.

Therefore something else must go with the words "La Normandi," in order to constitute it, for them, a valid trade mark.

A. Bijur combined his name and a picture in his old copyright.

If they could have anything, it would be in the trade mark "*Normandi*" M. S. & Co., or M. Stachelberg, assignees of Asher Bijur. There is no allegation that we have used such an one.

This last observation leads to the third point.

THIRD: IF THE COMPLAINANTS HAD ANY TRADE MARK, THEY HAVE NO STANDING IN A COURT OF EQUITY TO SUE UNDER IT, BECAUSE, BEING ASSIGNEES, THEY HAVE USED THEIR MARK WITHOUT MAKING KNOWN TO THE PUBLIC THEIR TRUE RELATION TO THE MARK AND THE GOODS DISTINGUISHED BY IT.

The allegation of the bill is that between 1858 and 1865, Bijur, their assignor, had imparted great value to this brand, "La Normandi,"—that it had become "widely known" as his make.

In 1865 they say he assigned to them.

And they have been using the brand ever since without notice to the public that they were the manufacturers, and not Bijur.

"All who use trade marks indicating that the articles were originally manufactured or owned by others, are practicing an imposition upon the public. Every assignee or purchaser who has the trade mark of the original proprietor, without indicating that he is the assignee or purchaser, is in this position."

Sherwood v. Andrews, 5 Am. L. Reg. N. S. 588.
Partridge v. Menck, 2 How. App. Cas. 547.
Manhattan Med. Co. v. Wood, 108 U. S. 223.

Now, complainants claim as assignees of Asher Bijur, and therefore their alleged trade mark should show that they are his assignees.

The allegations of their bill show that their title was derived from Bijur.

If they stand upon a common law title, (as their bill would seem to indicate), then they are in collision with the principles set down in *Sherwood v. Andrews*, *Partridge v. Menck*, and *Manhattan Med. Co. v. Wood*.

Under this claim how do they stand? Instead of announcing themselves as the successors and assignees of A. Bijur, they say nothing about him at all, but put on their cigars, "La Normandi," thus making no announcement of the change of proprietors.

If the allegation of their bill is true, that they hold as assignees of Bijur, and failing so to advertise on their trade mark and in connection with its use, they have no standing in a Court of Equity.

The requirement of law is a positive one, not only that the assignee shall *not* announce falsely that the assignor *is* still making the goods, but he must state on his trade mark or label, that it is an assignee who is.

Siegert v. Abbott, 61 Maryland 286.

Reference is here made to the opinion of the Hon. Circuit Judge dismissing this bill.

Record, p. 141.

It is submitted that the bill should be here dismissed with costs for the respondent.

WILLIAM HENRY CLIFFORD,
for Respondent.

128-691

128-691

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~300~~ 41

GEORGE D. CRAGIN, APPELLANT,

vs.

C. L. POWELL ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED SEPTEMBER 21, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 300.

GEORGE D. CRAGIN, APPELLANT,

vs.

C. L. POWELL ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from State court	1	1
Petition	1	1
Exhibit—Patent No. 2976	4	3
Petition of defendant for removal	6	4
Bond of defendant for removal	8	5
Order for removal	11	6
Clerk's certificate	12	7
Order to place cause on equity docket, &c	12	7
Demurrer	13	8
Order sustaining demurrer and granting leave to amend bill	14	9
Deed of conveyance from Samuel Cragin *et ux.* to Geo. D. Cragin, Dec. 17, 1878	15	9
Answer	24	14
Motion and order to appoint surveyor	25	15
Oath of Surveyor Benj. McLaren	25	15
Report of survey by Benj. McLaren, filed June 6, 1881	26	16
Appendix to report of survey	30	18
Bill of costs of survey	35	22
Map No. 1—Map of the disputed boundary	37	22
No. 2—Map exhibiting discrepancies between the different surveys	38	22
Amended answer	39	22
Replication	44	25

JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 1, 1888.

	Original.	Print
Order on motion to homologate report of surveyor	45	26
Opposition to survey and report	46	26
Report of Benj. McLeran, deputy U. S. surveyor, filed Dec. 19, 1882	47	27
Map No. 1—Plat of the original survey, &c	50	28
No. 2—Plat made according to original survey, &c	51	28
Defendant's exceptions to original and supplemental reports of surveyor	52	28
Complainant's list of evidence	53	29
Exhibit F—Letter of Commissioner General Land Office to J. H. Acklen, Dec. 31, 1880	54	30
G—Letter of Benj. McLeran, deputy U. S. surveyor, to surveyor general of La., May 7, 1881, &c.	55	30
Testimony for complainants	58	31
Testimony of C. L. Powell	59	32
Thomas Raby	66	36
Benj. McLeran	74	41
Exhibit—Description of lands selected for swamp lands, &c.	87	48
Defendant's list of evidence	88	48
Testimony for defendant	88	49
Testimony of Manual Smith	89	49
Richard Wilson	95	52
George D. Craigan	99	55
Admissions of complainants	104	58
Map of T. 20 S., R. 17 E., southeast district La.	105	58
Letter of Commissioner General Land Office to surveyor general La., June 27, 1855	106	58
Order as to ruling confirming surveyor's report	109	60
Decree confirming report of surveyor	110	60
Motion and order for appeal	111	61
Bond	111	61
Clerk's certificate	113	62

a UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.
In Equity.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

J. S. & J. T. Whitaker, for complainants, appellees; Rouse & Grant, for defendant, appellant.

Appeal returnable to the Supreme Court of the United States, at the city of Washington, D. C., the second Monday of October, A. D. 1885.

1 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 9177. C. L. Powell *et als. vs.* G. D. Cragin.

CERTIFIED COPY OF RECORD.

Petition. Filed Nov. 1, 1880.

THE STATE OF LOUISIANA:

19th Judicial District Court, Parish of Terre Bonne.

C. L. POWELL *et als.*
vs.
G. D. CRAGIN. } No. 4089.

To the honorable the judge of the nineteenth judicial district court of the State of Louisiana in and for the parish of Terre Bonne:

The petition of Christian L. Powell, Joseph O. Ayo, and Ludger Gaidry, all residents of the parish of Terre Bonne, State of Louisiana, respectfully shows—

That they are the owners of the following property, situated in the parish of Terre Bonne, State aforesaid: The east half of the southeast quarter of section ten (10), the east half of east half of section fifteen (15), the west half of southwest quarter of section fourteen (14), the east half of east half of section twenty-two, and the west half of west half of section twenty-three, all in township
2 twenty south, of range seventeen east, in the southeastern district, west of river, containing 635.58 acres; which said property is owned by petitioners in the proportion of an undivided one-half to said Powell and an undivided one-fourth each to said Ayo and to said Gaidry.

That said property was patented by the State of Louisiana to Samuel Wolf on the 12th April, 1878, as appears from the letters patent issued by said State, hereto annexed and made part hereof.

That by private act of sale of date January 20th, 1879, the said Samuel Wolf conveyed said property to Christian L. Powell, one of your petitioners, which said private act was duly proved up and

recorded on the 10th May, 1880, in the conveyance record of this parish.

That by authentic act executed on the 10th May, 1880, before G. Montegut, deputy clerk of this court, the said Powell sold and conveyed an undivided one-half of said property to your petitioners, Joseph O. Ayo and Ludger Gaidry, in the proportion of an undivided one-quarter to each.

That said patent to said Wolf, said private act of sale from Wolf to said Powell, and said authentic act of sale from said Powell to said Ayo and Gaidry were all duly and regularly and legally recorded in the conveyance record of the parish of Terre Bonne, in accordance with law, as appears from the certificates of the recorder of this parish annexed to said patents to said private act and to a copy of said authentic act, all annexed hereto and made part hereof.

That petitioners annex hereto and make part hereof the said patent to said Wolf, the said act of sale from said Wolf to said Powell, with the proof on which it was admitted to registry, and a copy of the act of sale from said Powell to Ayo and Gaidry.

3 Petitioners aver that said property is bounded on the north and west by the property of George D. Cragin, to which it is contiguous; that the said property so contiguous to that of petitioners was purchased by said George D. Cragin as a part of the Dulac plantation from Samuel Cragin by act of sale of date December 17th, 1878, and duly recorded in the conveyance record of this parish in Book D D Conveyances, p. 576 *et seq.*

Petitioners aver that the boundaries between the property of the petitioners aforedescribed and that of the contiguous property of said Cragin have never been determined since the proprietorship of these petitioners commenced, and if the bounds have ever been formally fixed they are no longer to be seen, and these petitioners desire to compel the said George D. Cragin to fix the limits between their said properties aforesaid.

That petitioners have applied to said Cragin and proposed to him to have the boundary between them fixed extrajudicially, but that said Cragin has declined.

That the said George D. Cragin is an absentee residing in the State of New York, and has no agent in the State of Louisiana, but that said Cragin has property situated in the parish of Terre Bonne.

Wherefore your petitioners pray that the court do appoint a *curator ad hoc* to represent the said George D. Cragin herein; that he be duly cited through said curator *ad hoc* to appear before this court to answer this demand, and that after the legal delays and due proceedings there may be judgment rendered in favor of petitioners and against said Cragin fixing the limits between the respective properties of plaintiffs and defendant as aforesaid, and that defendant deliver to plaintiffs possession of the lands claimed and set forth in their petition.

4 And petitioners pray for all necessary orders in the premises, and for costs and for all and general relief, etc.

(Signed) JNO. B. WINDER,
Att'y for Plaintiffs.

Before me, the undersigned authority, personally came and appeared Mr. Christian L. Powell, one of the plaintiffs in the foregoing petition, who, being duly sworn, did say that all and singular the allegations of the foregoing petitions are true.

(Signed) CHRISTIAN L. POWELL.

Sworn to and subscribed before me this 7th day of June, A. D. 1880.

[L. S.] (Signed) E. W. CONDON, *Clerk.*

Patent No. 2976.

State of Louisiana to all to whom these presents shall come, Greeting:

Whereas Samuel Wolf, of the parish of Terre Bonne, in the State of Louisiana, purchased, per certificate No. 2552, N. S. D., April 12th, 1878, east half of southeast quarter of section ten, east half of east half of section fifteen, west half of southwest quarter of section fourteen, east half of east half of section twenty-two, and west half of west half of section twenty-three, in township twenty south, of range seventeen east, in the southeastern district, west of river, containing six hundred and thirty-five $\frac{58}{100}$ ($635\frac{58}{100}$) acres, tidal overflow, according to the official plat of the survey of said lands in the State land office:

Now know ye that the State of Louisiana, in consideration of the premises and in conformity with law in such cases made and provided, has given, granted, and sold, and by these presents does give, grant, and sell, unto the said Samuel Wolf and to his heirs the above-described land to have and to hold the same, together with all the rights, titles, and privileges thereunto belonging, unto the said Samuel Wolf and to his heirs and assigns forever.

In testimony whereof I, Francis Tillou Nicholls, Governor of the State of Louisiana, have caused these letters to be made patent and the seal of the State land office to be hereunto affixed.

Given under my hand, at the city of New Orleans, on the — day of April, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred and second.

By the Governor:

[L. S.] (Signed) FRANCIS T. NICHOLLS.
L. FREMAUX, *Register.*

Record of patent, vol. 19, page 249.

6 *Petition of Defendant for Removal.*

THE STATE OF LOUISIANA, *Parish of Terre Bonne:*

19th Judicial District Court, Parish of Terre Bonne.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 4089.

To the honorable the nineteenth judicial district court of the State of Louisiana, sitting in and for the parish of Terre Bonne:

The petition of George D. Cragin, of the town of Harrison, State of New York, respectfully shows—

That your petitioner is the defendant in the above entitled and numbered suit; that said suit was instituted by Christian L. Powell, Joseph O. Ayo, and Ludger Gaidry, the plaintiffs, on the 7th day of June, A. D. 1880, in the nineteenth judicial district court of the State of Louisiana, sitting in and for the parish of Terre Bonne, the next term of which court is to be held on the second Monday of July, 1880, and that said plaintiffs are and were at the time of bringing said suit citizens of the State of Louisiana, and your petitioner is and was at the said time of bringing this suit a citizen of the State of New York.

Your petitioner further respectfully shows that said plaintiffs pray for a survey to establish the boundary lines between the lands claimed by said plaintiffs and the lands contiguous thereto, belonging to your petitioner, the real object and purpose of said plaintiffs in the aforesaid suit being to expropriate about one hundred and fifty acres of arable land actually cultivated in sugar cane and
7 Indian corn, and to give said land to the said plaintiffs. The said one hundred and fifty acres of land are worth fully one thousand dollars, and the said land is the principal matter indispute.

Your petitioner therefore avers that the matter in dispute in the said suit exceeds the sum of five hundred dollars exclusive of costs.

Your petitioner would further respectfully represent that the said suit is one in which there can be a final determination of the controversy in the nineteenth judicial district court aforesaid, wherein the same is pending for trial in the parish of Terre Bonne, and that the first term of said court at which said suit can first be tried since said suit was instituted will begin in the said parish of Terrebonne, on the second Monday of July, A. D. 1880.

Your petitioner further represents that he is willing and ready to give such bond and sufficient surety as this honorable court may direct for his doing all acts and things required to be done by the provisions of law for the removal of a suit into the United States circuit court, and he offers herewith his bond, executed by —— ——, of the parish of Terre Bonne, as surety, in the penal sum of two hundred and fifty dollars, conditioned according to law.

Wherefore your petitioner prays that the said bond may be ac-

cepted as good and sufficient surety, according to the provisions of the act of Congress approved March 31st, 1875, and that the said suit may be removed into the next circuit court of the United States to be held in the district of Louisiana, in the fifth circuit, pursuant to the statute of the United States in such cases made and provided, and that no further proceedings may be had in the
8 said suit in this honorable court.

And your petitioner will ever pray.

(Signed) G. D. CRAGIN,
CLAY KNOBLOCK,
Att'y for Petitioner.

STATE, CITY, & COUNTY OF NEW YORK, *ss:*

George D. Cragin, the petitioner in the foregoing petition, being duly sworn, deposes and says that he has read the petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true, and further saith not.

(Signed) G. D. CRAGIN.

Subscribed and sworn to this 22d day of June, A. D. 1880, before me.

Witness my hand and official seal.

[L. S.] (Signed) CHARLES NETTLETON,
Commissioner for Louisiana in New York.

Filed June 30th, 1880.

(Signed) E. W. CONDON, *Clerk.*

Bond of Defendant.

THE STATE OF LOUISIANA, *Parish of Terre Bonne:*

19th Judicial District Court, Parish of Terrebonne.

C. L. POWELL *et als.* } No. 4089.
vs.
GEORGE D. CRAGIN.

9 We, George D. Cragin, of Harrison county, State of New York, as principal, and Edmund McCollam, of the parish of Terre Bonne, State of Louisiana, as surety, are held and firmly bound unto Christian L. Powell, Joseph O. Ayo, and Ludger Gaidry, plaintiffs in the above cause, in the sum of two hundred and fifty dollars, lawful money of the United States, to be paid to the said Christian L. Powell, Joseph O. Ayo, and Ludger Gaidry, their successors and assigns; for which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators firmly by these presents.

Sealed with our seals. Dated this 28th day of June, A. D. 1880.

Whereas suit was brought on the 7th day of June, 1880, in the nineteenth judicial district court of the State of Louisiana, sitting

in and for the parish of Terre Bonne, by the said Christian L. Powell, Joseph O. Ayo, and Ludger Gaidry against the said George D. Cragin, and the same is now pending for trial in the parish of Terrebonne, in the nineteenth judicial district court, and is removable into the circuit court of the United States for the district of Louisiana, in the fifth circuit, under the act of Congress approved March 3rd, 1875, "entitled an act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes;"

And whereas the said George D. Craigin has filed his petition in the the said nineteenth judicial district court, sitting in and for the parish of Terrebonne, for the removal of said suit into the next circuit court of the United States to be held in the district of Louisiana, fifth circuit:

Now, therefore, the condition of the above obligation is such that if the above bounden George D. Cragin or his legal
10 representative shall enter into such circuit court on the first day of its next session a copy of the record in said suit, and shall pay all costs that may be awarded if the said circuit court should hold that said suit was wrongfully or improperly removed thereto, and shall do such other appropriate acts as by the said act of Congress approved March 3d, 1875, are required to be done upon the removal of a cause from the State to a United States court, then the above obligation to be null and void; otherwise, to remain in full force and virtue.

(Signed) G. D. CRAGIN.
EDMUND McCOLLAM.

THE STATE OF LOUISIANA, *Parish of Terre Bonne:*

Edmund McCollam, of the parish of Terre Bonne, State aforesaid, being first duly sworn according to law, deposes and says that, all his debts paid and over and above any property of his exempt from seizure, he is fully worth the sum of two hundred and fifty dollars in property subject to seizure.

(Signed) EDMUND McCOLLAM.

Sworn to and subscribed before me this 28th day of June, 1880.

[L. S.] (Signed) G. MONTEGUT,
D'y Clerk 19th Jud. Dist. Court &
Ex Officio Recorder, Terre Bonne.

Accepted and filed June 30th, 1880.

(Signed) E. W. CONDON, *Clerk.*

11 *Extract from Minutes.*

C. L. POWELL *et als.*
vs.
GEO. D. CRAGIN. } No. 4089.

In this case, on motion of counsel for defendant and no objection being made by counsel for plaintiffs, court granted and signed an

order transferring this case to the next circuit court of the United States for the district of Louisiana, and that no further proceedings be had herein in this honorable court.

Order.

STATE OF LOUISIANA, *Parish of Terre Bonne:*

19th Judicial District Court.

C. L. POWELL *et als.* *vs.* GEO. D. CRAGIN. } No. 4089.

Upon reading and filing the petition of the above-named defendants herein for the removal of this suit into the circuit court of the United States for the District of Louisiana, in the fifth circuit, in pursuance of the laws of the United States, and upon filing the security offered by said defendant according to the requirements of said laws, and on motion of Clay Knobloch, of counsel for the said defendant—

It is hereby ordered that the said security be accepted and the said suit be removed into the next circuit court of the United States to be held in said district and circuit, and that no further proceedings be had in said suit in this court, opposing counsel not objecting.

Thus done and granted in open court, parish of Terre
12 Bonne, State of Louisiana, this twelfth day of July, A. D. 1880.

(Signed) F. S. GOODE,
Judge 19th Judicial District of Louisiana.

Filed July 12th, 1880.
(Signed) E. W. CONDON, *Clerk.*

Certificate of Clerk.

STATE OF LOUISIANA, *Parish of Terre Bonne:*

19th Judicial District.

I, Edward W. Condon, clerk of the nineteenth judicial district court, sitting in and for the parish of Terre Bonne, Louisiana, do hereby certify that the foregoing twenty-six pages contain a full, true, and correct copy of all documents filed and all proceedings had in the suit entitled and numbered C. L. Powell & *als. vs.* Geo. D. Cragin, No. 4089, in the above-named court.

Witness my hand and seal of office, Houma, La., this 20th day of July, 1880.

[SEAL.] (Signed) E. W. CONDON,
Clerk of 19th Dist. Court, Terre Bonne.

Order to Place Cause on Equity Docket.

Extract from the Minutes. November term, 1881.

United States Circuit Court, Eastern District of Louisiana.

NEW ORLEANS, SATURDAY, *November* 19, 1881.

Court met pursuant to adjournment.

13 Present: Hon. Edward C. Billings, district judge.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

On motion of Rouse & Grant, solicitors for respondent, and suggesting to this court that the above-entitled cause is properly of equitable cognizance in this court and should proceed according to the courts of equity—

It is ordered that plaintiffs show cause instanter why the cause should not be placed on the equity side of the docket and be proceeded with accordingly.

Whereupon, service being accepted by counsel for the complainants, here present in open court, the rule was taken up and was argued by counsel.

On consideration whereof it is ordered that the rule be made absolute, and that this cause be placed on the equity side of the court and be proceeded with accordingly.

And upon the application of the defendant's solicitor it is further ordered that the defendant be granted two weeks' time to amend his answer and plaintiffs have leave to amend their petition, if they see proper.

Demurrer. Filed Dec. 16, 1880.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

14 Demurrer of George D. Cragin, defendant, to the bill or petition of C. L. Powell *et als.*, plaintiffs.

This defendant, not confessing any part of the plaintiffs' bill or petition to be true, as therein alleged, doth demur thereto, and, for cause of demurrer, says—

1st. That said bill or petition doth not describe or set forth what lands of this defendant adjoins those owned by them, nor doth it state upon what side the lands of plaintiffs adjoin that of this defendant.

2d. This defendant cannot ascertain what particular boundaries the plaintiffs wish to have fixed from a perusal of said bill or petition, and cannot safely answer the same.

Wherefore, and for divers other good and sufficient causes appearing in said bill or petition, this defendant doth demur thereto, and doth therefore pray the judgment of this honorable court whether he shall be compelled to make further answer, and he prays to be hence dismissed with his costs in this behalf sustained.

(Signed) ROUSE & GRANT,
Solicitors for D'f't.

Affidavit waived.

(Signed) J. S. WHITTAKER,
Coun. for Pla'ffs.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

(Signed) WM. GRANT,
Of Counsel.

Order.

Extract from the Minutes. November term, 1880.

15 United States Circuit Court, Eastern District of Louisiana.

NEW ORLEANS, THURSDAY, *April* 7, 1881.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

C. L. POWELL *et als.* } No. 9177.
vs.
GEORGE D. CRAGIN.

This cause came on to be heard on the demurrer to the bill, and was argued by counsel for the parties, respectively.

On consideration whereof it is ordered that the said demurrer be sustained, with leave to the complainants to amend by filing the deed of sale of Samuel Cragin and wife to George D. Cragin, of date 17th December, 1878, as an exhibit to their bill of complaint.

Deed of Conveyance. Filed April 7, 1881.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.* } No. 9177.
vs.
GEORGE D. CRAGIN.

This indenture, made this 17th day of December, in the year of our Lord one thousand eight hundred and seventy-eight, by and between Samuel Cragin and Katharine Elizabeth Schell
16 Craigin, his wife, of the parish of Terre Bonne, Louisiana, parties of the first part, and George Dakin Craigin, of the same place, and party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the price and sum of —, and on the terms and conditions hereinafter expressed, *and* do by these presents grant, bargain, sell, convey,

transfer, assign, and set over unto the said parties of the second part the following-described property situate in the State of Louisiana, to wit:

"A certain sugar plantation, together with the buildings and improvements thereon, and all rights, ways, privileges, and appurtenances thereunto belonging or in anywise appertaining, situated in the parish of Terre Bonne, State of Louisiana aforesaid, on the descending or eastern bank of the Bayou Grand Caillou, known as the Du Lac plantation" containing six thousand acres of land, more or less, and being composed of the following-described tracts or parcels of land, to wit:

First. All that portion of the Pedro Gonzales tract lying on the said left, descending, or eastern bank of the Bayou Grand Caillou and measuring nineteen arpents front on said Bayou Grand Caillou by twenty arpents in depth, bounded below by the property herein secondly described and above by property formerly belonging to the heirs of William Terre Bonne, now to Hector Buron and J. Lapene or their assigns, same being now surveyed and known as section No. nineteen of township No. nineteen, range seventeen east.

Second. All that portion of the Jacques Lowsbey or Lambert tract, measuring thirty-seven arpents front on said Bayou Grand Caillou by fifty arpents in depth, which lies on said left, descending, or eastern bank of said bayou, and is bounded above by the
17 property herein firstly described and below by property belonging to Solomon Wilson.

Third. A certain portion of the Jean Charles Theriot grant, lying on the same bank of said Bayou Grand Caillou, measuring three arpents front on said bayou by ten arpents in depth, and being bounded above by property belonging to M. Panier and below by property now or formerly belonging to Robert R. Barrow.

Fourth. A certain portion of the Jean Charles Theriot grant, lying on the said bank of said Bayou Grand Caillou, measuring eighteen and three-fourths arpents front on said bayou by ten arpents in depth, and being bounded above by said property now or formerly belonging to R. R. Barrow and below by the property herein fifthly described.

Fifth. All that portion of the Louis Crossier tract lying and being on said left, descending, or eastern bank of said Bayou Grand Caillou and measuring forty arpents front on said bayou by forty arpents in depth, the same being bounded above by property herein fourthly described and below by public lands formerly —, but now held by present vendor under patents and transfers, excepting and reserving, however, two arpents front on Bayou Grand Caillou by six arpents in depth off the lower S. W. corner.

Sixth. Fractional sections Nos. thirty-nine and forty, in township No. eighteen of range No. nineteen east, containing six hundred and four $\frac{60}{100}$ acres, sold by the Government of the United States, under receiver's receipt No. 2918, dated the fifth day of May, eighteen hundred and forty-six, issued in the name of William Craig Mylne, as assignee of Estreatublee, Jonah, and Jachelionobe.

Seventh. Section No. forty-one, in township No. eighteen (west of the Mississippi river) of range No. seventeen east, containing thirty-seven $\frac{80}{100}$ acres, patented by the United States unto Messrs.
18 A. & J. Denniston & Co. under patent No. 2810; section No. forty-two, in same township and range, containing three hundred and eighty $\frac{28}{100}$ acres, patented by the United States unto said A. & J. Denniston & Co. under patent No. 2811, and section No. forty-three, in same township and range, containing one hundred and twenty-five $\frac{55}{100}$ acres, patented by the United States unto said Messrs. A. & J. Denniston & Co. under patent No. 2812.

Eighth. Lot No. two of section No. one hundred and thirteen, in township No. twenty (west of the Mississippi river) of range No. eighteen east, in the district of lands subject to sale at New Orleans, Louisiana, containing sixty-eight acres, patented by the United States unto William Craig Mylne by patent No. 2999; fractional section No. one hundred fourteen, in the same township and range and district, containing one hundred and fifty-eight acres, patented by the United States unto William Craig Mylne by patent No. 3000; the north half of the southeast quarter and the northeast quarter of the northwest quarter of section No. twenty-five, in township No. twenty (west of the Mississippi river) of range No. seventeen east, in the district aforesaid, containing one hundred and nineteen seventy-seven one hundredths acres, patented by the United States unto said Mylne by patent No. 3001, and the east half of the northeast quarter of said section No. thirty-five, in the same township, range, and district, containing seventy-nine $\frac{85}{100}$ acres, patented by the United States unto said Mylne by patent No. 3002.

Ninth. The east half of the southwest quarter of section No. eleven, in township No. twenty (west of the Mississippi river) of range No. seventeen east, in the district of lands subject to sale at New Orleans, Louisiana, containing eighty acres, patented by the United States unto Elisha Stevens by patent No. 2074, and fractional
19 section No. three, in the same township, range, and district, containing forty-one $\frac{72}{100}$ acres, patented by the United States unto said Stevens by patent No. 2119; and,

Tenth. Lot No. one of section No. two, in township No. twenty (west of the Mississippi river) south of range No. seventeen east, in the district of lands subject to sale at New Orleans, Louisiana, containing twenty-one acres and $\frac{70}{100}$ of an acre, patented by the United States unto John Morris Bach by patent No. forty; lot No. two of said section No. two, in the same township, range, and district, containing forty-six acres and thirty-hundredths of an acre, patented by the United States unto said Bach by patent certificate No. forty-one; lot No. three of said section No. two, in the said township, range and district, containing thirty-two acres, patented by the United States unto the said Bach by patent certificate No. forty-two; lot No. four of said section No. two, in the same township, range, and district, containing fifty-six acres, patented by the United States unto said Bach by patent certificate No. fifty-seven; the northeast quarter of section No. twenty-one, in the same township, range, and district, containing one hundred and forty-three acres seventy-hundredths of

an acre, patented by the United States unto said Bach by patent certificate No. fifty-eight; the southwest quarter of section No. twenty-seven, in the same township, range, and district, containing one hundred and forty-nine acres and $\frac{19}{100}$ of an acre, patented by the United States unto the said Bach by patent certificate No. 2078; the southwest quarter of section No. ten, in the same township, range, and district, containing one hundred and sixty acres, patented by the United States unto said Bach by patent certificate No. 2079; the southwest quarter of section No. twenty-two, in the same township, district, & range, containing one hundred and fifty-seven $\frac{22}{100}$ acres, patented by the United States unto said Bach by patent certificate No. 2080; the northwest quarter of section No. eleven, in the same township, range, and district, containing one hundred and fifty-nine $\frac{18}{100}$ acres, patented by the United States unto said Bach by patent certificate No. 2081; the west half of the southeast quarter of section No. fifteen, in the same township, range, and district, containing eighty acres, patented by the United States unto said Bach by patent certificate No. 2082; the west half of the southeast quarter of section No. twenty-two, in the same township, range, and district, containing seventy-nine $\frac{95}{100}$ acres, patented by the United States unto said Bach by patent certificate No. 2083; the northwest quarter of section No. twenty-seven, in the same township, range, and district, containing one hundred and fifty acres, patented by the United States unto the said Bach by patent certificate of the United States No. 2084; the west half of the northeast quarter of said section No. twenty-seven, in the same township, range, and district, containing seventy-nine $\frac{95}{100}$ acres, patented by the United States unto said Bach by patent certificate No. 2085; lots Nos. one and two and three of section No. thirty-four, in the same township, range, and district, containing together seventy acres and $\frac{64}{100}$ of an acre, patented by the United States by patent certificate No. 2086; the west half of the northeast quarter of section No. fifteen, in the same township, range, and district, containing eighty acres, patented by the United States unto said Bach by patent certificate No. 2087; the west half of the northeast quarter of section No. twenty-two in the same township, range, and district, containing eighty acres, patented by the United States unto said Bach by patent certificate No. 2088; lot No. one of the said section No. twenty-two, in the same township, range, and district, containing twenty-five acres, patented by the United States unto said Bach by patent certificate No. 2089; the west half of southeast quarter of section No. ten, in the same township, range, and district, containing eighty acres, patented by the United States unto said Bach by patent certificate No. 2100; the northwest quarter of section No. fifteen, in the same township, range, and district, containing one hundred and sixty acres, patented by the United States unto said Bach by patent certificate No. 2109; and the northeast quarter of section No. ten, in the same range, township, and district, containing one hundred and fifty-nine acres and $\frac{69}{100}$ of an acre, patented by the United States unto said Bach by patent certificate 2110; also the sugar-mill, machinery, boilers, engines, mules, carts, wagons, oxen, sheep, hogs,

horses, aratory implements, and all articles of personal property on and attached to said plantation and used or employed in the cultivation thereof. The above-described tracts of land or plantation was acquired by the present vendors by purchase from A. Norrie and J. B. Johnston & wife, who acquired the same from Samuel Cragin, who acquired the same from Geo. D. Cragin, who acquired the same by purchase from John M. Pelton, of Louisiana, by an act passed before Andrew Hero, Jr., a notary public, in the city of New Orleans, Louisiana, on the thirty-first day of January, eighteen hundred and seventy, and recorded in the office of the recorder of the parish of Terre Bonne, town of Houma, State of Louisiana, in Book "T" of Conveyances, page- 529 and 545, inclusive:

To have and to hold the said property and appurtenances unto the said purchaser, his heirs, and assigns, forever; and the said vendors, moreover, transfer unto the said purchasers all the right,
22 title, and actions of warranty to which they are entitled against all the former proprietors of the property herein conveyed, subrogating said purchaser to the said rights and actions, to be by him enjoyed and exercised in the same manner as they might have been by the said vendors.

This sale is made and accepted for and in consideration of the price and sum, one dollar, and other good and valuable considerations, which are hereby acknowledged as having been received by the present vendors, and the present vendors hereby declare that there is excluded from the Crossier's tract, on the property herein fifthly described, a small piece or portion thereof, at the extreme lower end or southwest corner thereof, measuring two arpents front on Bayou Grand Caillou by six arpents in depth between parallel lines, which were granted by Jno. M. Pelton unto one Daniel Jones. The party of the second part hereto hereby assumes and agrees to pay all liabilities of whatsoever nature standing of record or otherwise against the said Du Lac plantation above described, whether in the form of mortgages, notes, or open accounts.

In testimony whereof the parties of the first part hereto have hereunto set their hands and seals the day and year first above written.

(Signed) SAM'L CRAGIN. [SEAL.]
KATHARINE E. S. CRAGIN. [SEAL.]

Sealed and delivered in the presence of—
WILLIAM H. CLARKSON.
WILLIAM D. WARD.
CHARLES EDGAR MILLS,
Commissioner of Louisiana.

STATE OF NEW YORK, *City and County of New York:*

Be it remembered that on this 17th day of December, A. D.
23 1878, before me, Charles Edgar Mills, a commissioner of the State of Louisiana, in New York, residing in said city of New York, personally appeared Samuel Cragin and Katharine Elizabeth Schell Cragin, to me well known to be the individuals

named in and who executed the foregoing instrument, and acknowledged to me that they did sign, seal, and deliver to same, as their free act and deed, on the day and year therein mentioned, and for the consideration, uses, and purposes therein expressed, and the said Katharine Elizabeth Schell Cragin, being by me first made acquainted with the contents of said instrument in an examination apart from her husband, and fully advised of the nature of her rights upon her husband's property, acknowledged that she executed the same freely and without compulsion or undue influence of her said husband.

In witness whereof I have hereunto set my hand and affixed my official seal this 17th day of December, A. D. 1878.

[L. S.] (Signed) CHARLES EDGAR MILLS,
Commissioner for Louisiana in New York.

THE STATE OF LOUISIANA, *Parish of Terre Bonne:*

I certify the foregoing document is a true and correct copy from the records of my office, as recorded in the conveyance record thereof, in Book "D D," fo's 576 & *seq.*, on April 26th, 1879.

In faith whereof witness my hand and seal of office, at Houma, State and parish aforesaid, on this 21st day of December, A. D. 1880.

[SEAL.] (Signed) G. MONTEGUT,
D'y Clerk, Terre Bonne.

24 *Defendant's Answer. Filed April 19th*, 1881.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

The answer of the defendant, George D. Cragin, to the plaintiffs' bill or petition against him.

This defendant, not admitting or confessing any of the allegations of said petition or bill, for answer thereto, says: 1st, this defendant says that he and his grantors have held and possessed the Dulac plantation and that part thereof acquired by him by purchase of Samuel Cragin on the 17th day of December, 1878, for a period of thirty years and upwards; that such possession has been continuous, public, peaceable, and undisputed, and in good faith, without notice of the claims of any person whatever, and within well-defined boundaries, this defendant and his grantors having used and cultivated said property within said boundaries. This defendant therefore denies that it is necessary to fix or establish the lines separating his property from the alleged lands of plaintiffs, as prayed for by them.

And having fully answered, this defendant prays that the plaintiffs' demand be rejected at their costs.

(Signed) ROUSE & GRANT,
For Defendant.

Affidavit of defendant waived to answer.

(Signed) J. S. & J. T. WHITTAKER, *Att'ys.*

25 *Motion to Appoint Surveyor. Entered and Filed May* 2, 1881.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

On motion of J. S. & J. T. Whittaker, of counsel for plaintiffs, and on suggesting to the court that the appointment of a surveyor is essential and necessary in this case for the purpose of determining the boundary lines between the properties of plaintiffs and defendant, and on further suggesting that, by consent of parties, Benjamin McLaren, United States surveyor, has been selected for the purpose, but that said surveyor requires that his expenses for said survey be paid in advance—

It is ordered that the plaintiffs have leave to advance to the said McLaren one hundred dollars as expenses for said survey, without prejudice to the rights of said plaintiffs to the recovery of the costs so advanced in these proceedings under future orders of this honorable court, and that said Benjamin McLaren be appointed surveyor for the purposes set forth, and that he make report to the court of his proceedings within reasonable delay.

26 *Oath of Benjamin McLaren. Filed May 3d,* 1881.

United States Circuit Court, Eastern District of Louisiana.

C, L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

Personally appeared before the undersigned authority Benjamin McLaren, United States surveyor, who, being duly sworn, says that he will faithfully and to the best of his knowledge and ability perform his duties as surveyor in this behalf and without partiality to either party in interest in this cause, and within a reasonable delay make report to this honorable court of what he shall do in the premises.

(Signed) BENJ. McLAREN.

Subscribed and sworn before me May 3rd, 1881.

(Signed) T. V. COUPLAND,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

Report of Survey by Benj. McLaren. Filed June 6, 1881.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

NEW ORLEANS, *June 4th*, 1881.

To the honorable the judge of the U. S. circuit court, eastern district of Louisiana:

Pursuant to an order from your honorable court, dated May 2d, 1881, appointing me as surveyor to determine the boundary
27 lines between the properties of plaintiffs and defendant in the suit of C. L. Powell *vs.* G. D. Cragin, I beg to make the following report of operations in the field occupying from May 9th till May 21st, 1881:

It appears from papers in the case that the property of the plaintiff- is a strip of tidal overflowed land in the form of an L, patented by the State of Louisiana to Samuel Wolf in 1878, containing 635.58 acres, and bounded on the west and north by property of defendant, patented to Morris Bach from the United States, in sections 10, 15, & 22 of T. 20 S., R. 17 E., southeastern land district, west of the Mississippi Both titles call for areas in accordance with the plat and field notes of a survey of G. F. Connely made in 1837, the first procured recently from the State of Louisiana, the second remotely from the United States.

From records on file in the U. S. surveyor general's office at New Orleans it appears that this survey, with that of neighboring townships made by the same parties, was at one time regarded so erroneous as to occasion a letter of instructions from the surveyor general, dated April 5th, 1848, commissioning Thomas H. Weightman to make an examination and report on the whole matter. In the report made pursuant —, as embodied in the said surveyor general's letter to commissioner, dated Oct. 3, 1849, he recommends the resurvey of adjoining townships and of "all lands fronting on Bayous Caillou and Terre Bonne to the coast," which had previously been surveyed by Foster and Walker and by Maxwell and Connelly. It was in accordance with this report that the townships north and east of this one were resurveyed by Joseph Gorlinski, D. S., the following years; that he proceeded with these resurveys into the present township so far as to complete the claim lines to section 37, Louis
Cossier grant (see plat No. 2, red line), in the field notes of
28 which he claims to have identified the lower line of the lower front corner and the corner itself on the left bank of Grand Caillou bayou. In establishing the lower boundary of township above, or T. 19–17, he also claims to have found the old 3d mile post and seems to have regarded it as a governing point each way for the intervening distances of his mile posts, as they reckon 80.00 ch's westward and eastward, making an overplus for the first or

western mile and a deficiency in the last or 6th mile interval. (See plats 1 and 2.)

The errors of preceding surveys in running township lines were corrected by the jog in the corners made by the closing of these lines. Had the resurveys continued to this township it is reasonable to suppose that the old section lines would have been followed nearly as possible, which would have cut down the areas of the eastern tier of sections by more than one-third, while the balance of the interior sections would have contained about the same areas as before, except that a change in the area of fractional section 2 would result from an extension of lower line to claim No. 37, going east from Grand Caillou.

In view of the circumstances of the case described, the rule to be followed by the surveyor in executing the survey in question is plain. He must be guided by the field notes of the survey under which the titles are procured, which are those of Connely, and in setting off the line in question, which is made up of subdivisional section lines, he must first find convincing marks of the survey on the ground as near as possible to the line in project from which to connect the work. Should no marks or other good evidences of the old survey be found, and if the parties to the dispute will not
29 agree to a line of consent, then it would seem that the only course left for the surveyor to pursue would be to draw such a line as would have been run by a U. S. deputy surveyor in making a resurvey of the interior sections of the entire township. (See A of Appendix, p. 8)

In this view of the case I proceeded, on the 9th of May last, after due preliminaries required by law, to run lines of examination in order to find marks of an old line of agreement with the topographical features of the map, viz., a meander line from H to J; also lines from H, a, b, c, d, e, f, g, h, etc. (See map No. 1.) After diligent search and inquiry from people living in the vicinity I failed utterly in finding any section corner or trace of any land that had ever been run to accord with any map. (See p. 7, B.)

Failing in my efforts to discover any traces of the official survey, I next proceeded to examine the lines of claim No. 37, as run by Gorlinski, and found the line H a, by old blazes on the trees; also the corners H, K, and A. I connected points H and A together by twice-measured meander courses, and found them to agree well by calculation and to confirm nearly the same latitude for the township line. Then, after having searched in vain for old third-mile post, I proceeded to establish a township line by course and distance from A (this corner being better identified than H), and set 4th mile post and the half-mile post between this and the 3d mile post, L & M; thence, by connection of tested courses and distances, I established mile-post corner to natural sections 3–10, 2–11 and run thence south forty (40) chains, and set a half-mile post, E; thence west twenty chains to F, and thence south two hundred chains to "G," a post at a calculated distance of twenty (20) chains west from the corner to sections 22–27, 23–26 and at a distance of sixty (60) chains
30 east from corner to sections 21–28, 22–27, or the line E, F, G,

the boundary line between properties named in dispute and more perfectly described in *procès verbal* appended.

The line thus described is herewith submitted to the superior judgment of the court as a proper boundary line between the tracts of land called in question. It is, in my humble judgment, substantially such a line as would have been run had the whole township been resurveyed at the time Deputy Surveyor Gorlinski was resurveying the adjoining townships. It has for its base the township line, as resurveyed by said surveyor, who claims that the 3d mile post in his line is identical with that of the previous survey on which the Connely lines connected, and, proceeding from such a base, it carried out the intent of the original survey according to which the titles are drawn. It is sufficiently connected at the beginning and end with section corners, which either are or may be established from the same base whenever called for.

Doubtless this township should have been surveyed at the first on the radiating plan, according to which the only lines necessary to be marked would be across the high lands. To resurvey the whole now by the General Government merely for the purpose of giving connection to the lower end of the boundary line in question would, in my humble opinion, be of no practical benefit to the occupants of the land, since most of the corner posts would be set in the marsh and would in a few years disappear.

Respectfully summitted.

(Signed) BENJ. McLAREN,
U. S. Dep. Surveyor.

Appendix.

On inspecting the maps accompanying this report the
31 quality of the land falls under two classes:

1st. The wood being alluvious or narrow ridges of land on either side of the bayous, having an elevation of from 4 to 6 feet above the back level. These ridges are composed of a rich, black, loamy soil, easily worked and cheaply drained, and, when put under cultivation, becomes the best sugar-producing lands of the State.

2d. The far greater portion of the township consists of a sea marsh, large portions of which are known as trembling prairie, worthless for cultivation, always difficult and often dangerous for man or beast to traverse.

Very naturally the deputy surveyor under contract is tempted to confine his measurements to the valuable ridges along the bayous, and to supply deficiences in field notes by calculated distances across the marsh to the next bayou and ridge.

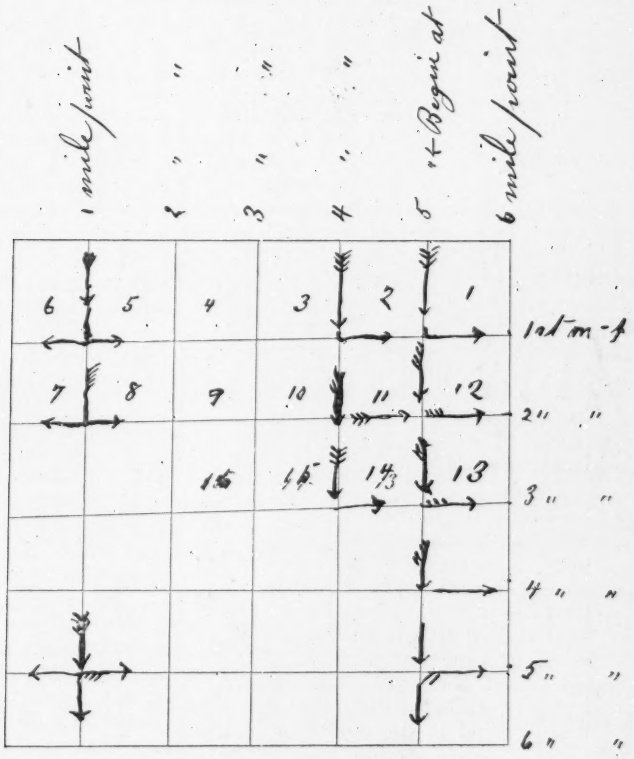
The township may have been surveyed in this manner, and hence the errors that now appear on the face of the map.

On the assumption that point H is a corner in Connely's survey, I nowhere found the position of bayous to agree with the map within 2 chains, while the difference was often much greater. There is an Indian mound at the mouth of Mound Bayou, just where, by his survey, Connely's section line passes, and yet no mention is made of it in his field notes. By this examination the same line

passes over five chains to the south. There are other disagreements as great, but none so remarkable as this. The disagreement in the location of Bayou Sale and Bayou Grassy is considerable, while Bayou Four Points, between secs. 15 and 22, seems to have been located by mistake—that is to say, some other bayou covered with grass may have been met with and mistaken for the continuation of this important bayou.

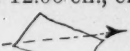
32 A.

The accompanying diagram is intended to show the order in which the section lines were run in making the original survey of townships by Connelly. Beginning at the 5th mile post run south and close each section by an east line, and so on with each tier till the last, which is closed by running west as thereon by the arrow. It is true this course would be liable to interruptions to some extent by the interference of old claim lines.



Process verbal of the survey of a line of disputed boundary, C. L. Powell *versus* G. D. Craigin, made between the 9th and 21st of May, 1881, by Benj. McLaren, court surveyor.

Beginning at the upper front corner of the Louis Cossier grant and on the left bank of the Grand Caillou bayou, at an iron grate bar (A on the map), identified by testimony and by original reference trees still standing, one of them bearing original marks X, and recorded in Gorlinski's fieldnotes, a live oak 30 inches dia., S. 64½ E. 64 links, and a live oak (now dead) 40 in. dia., N. 53° W. 69 links, which trees I remarked X; and thence S. 6½ E. 12.00 chains, S. 2¼ W. 9.00, S. 3½ W. 5.00 c., S. 14° E. 2.80 ch., S. 8½ W. 7.00 ch., east 2.20 ch., south 10.13 ch. to B, on south boundary of T. 19 S., R. 17 E., as run by Joseph Gorlinski, and at a calculated distance of 28.33
33 chains west from the 4th mile post and at a distance of 51.67 chains E. from the 3rd mile post, as set by said surveyor and identified as the same as the one set also by the previous survey, calling this point of intersection 51.67 chains, and having thrice measured the courses and distances before enumerated with a difference of only 10 links in departure and of 3 links in latitude, I run east from said point of intersection 56.47 ch. — road, 60.09 ch. to ash and willow swamp, 66.01 ch. to canal, S. E. 66.23 ch. across it; enter prairie; 80.00 ch. set post of wood (L) in trembling prairie—no trees near; thence south 4.00 ch's till stopped by deep deep marsh. I find it impassable. I return to 4th mile post, just set, and measure thence west 40.00 chains and set a one-half mile corner between 3d and 4th mile post, an iron grate bar in cultivated field near edge of swamp. Having thus re-established the township line by a double calculation and repeated trial, and satisfied with its correctness and close resemblance to the description given in Gorlinski's field notes, and being unable to prolong the line directly from the 4th mile post on account of an impassable marsh, I proceed from point of intersection described, and being 28.33 chains west of the 4th mile post and 51.67 chains east of the 3d mile post; thence S. 13° E. 34.00 ch., S. 31° E. 16.00 ch's, south 6.00. ch's, east 12.45 ch's and a latitude south 52.84 ch's and east 28.33 ch's, and having thrice gone over this work with substantially the same result to C; thence south 4.50 ch's to Bayou Sale; 9.00 ch's, enter cultivated field; 14.00 ch's, plantation road S. 47½ E.; 22.00 ch's, enter ash woods 27.16 ch's and 80 ch's south of 4th mile post; established a mile post, "D," an iron grate bar in the wet swamp, from which an ash 12 in. dia. bears N. 4° E. 64 links, X, and a maple 12 in. dia. bears N. 15° E. 72 links, X; thence south 3.00 chains to prairie; at 40.00 ch's set ¼ sec. cor. between sections
10, 11 E. in prairie; set post; no trees; sounded with pole
34 6 feet without finding hard bottom; thence west 20.00 ch's E., set corner post of wood—no trees; thence south, between E. and W. ½ of S. W. ¼ of sec. No. 10, 12.00 ch's, enter prairie 21.00 ch's, in border of prairie in swamp 36.00 ch's; enter field 40.00 ch's, set post of persimmon wood in cultivated field, whence forked wax tree 6 in. dia., S. 30° E. 109 l's; thence south, between east and west

half of east half of sec. 15, 1.00 ch., enter wood 12.00 ch., enter cultivation to small bayou 15.70 ch., leave cabin  22.64 ch., Bayou Four Points; on account of difficulty of crossing it diagonally, I run west 4.14 ch's; then south on a parallel 17.36 ch's, east 4.14; twice measured and found correct; set post in field for ½-mile post, whence oak 10 in. dia., S. 77¾ E., marked X, and being 5.00 ch's south of Bayou Four Points; continue south 43.80, to small bayou 80 l's wide; 52.00 — enter edge of woods, 72.00 — to lowlands; 73.00 ch's enter flat 300 links wide; 80.00 —, in low palmetto swamp at intersection of line between sections 15 and 22 and set post, whence oak 14 in. dia., N. 1° E. 30 l's, X; oak 16 in. dia., S. 13° E., 63 links, X; thence in sec. 22, between east and west ½ of east ½ south, 6.70 ch. to bayou, 7.00 — leave it, 11.00 — enter cane ridge, 20.00 ch. fresh water basin at left, 30.00 — still in cane, 35.00 ch's enter low prairie, 40.00 ch's set post, from which ash 8 in. dia., S. 39° W., 34 links, X; live oak 6 in. dia., S. 5° E., 49 links, X; continue south 58.00 ch's, leave woods, and enter cultivation 64.30 ch's to bank of Bayou Four Points; 28.20 ch's enter high land and leave the bayou; 76.00 ch's leave high land and enter prairie; 80.00 ch's set mile post at intersection of line between sections 22 and 27 at a calculated distance of 20.00 ch's west from corner to sections 22, 27, 23, 26, and a calculated distance of 60.00 ch's east from corner to sections 21, 28, 35 22, 27, from which a live oak. 12 in. dia., S. 27° W. 57 links. No other trees near to mark.

NOTE.—The line at F is 111 links north and 52 links west of a line run by A. Jolit, surveyor for Terre Bonne parish, in a south direction, and at the closing point "G," a distance of 105 links to the north and 76 links to the west of the corresponding point in his line, the line of Mr. Jolit having departed from the lower front corner (H) of claim No. 37.

In the present survey I have made use of a Gurley 5 in. needle compass, set to a variation of 7° 28′ east, found by experiment to retrace Gorlinski's line on the lower boundary of claim No. 37.

There were present as assistants in the work Leon Ozio, Baker Marleblanc, Ovil Pantoff, and Emile Parfait, all sworn as chainmen and at times assisting in that capacity. C. L. Powell was present the greater part of the time, both plaintiff and defendant having been served with a written notice of the intended survey on the 7th of the month and two days previous to the beginning of the work.

NEW ORLEANS, *June 4th*, 1881.

The above and foregoing is a correct extract from the field notes of a survey I have made under order of court, in the suit of Powell *versus* Craigin.

(Signed) BENJ. McLAREN,
U. S. Dept. Surveyor.

Bill of Costs.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL
vs.
G. D. CRAIGIN. } No. 9177.

36 To Benj. McLaren, Dr.

For ten days' field work, at rate of $15 per day, to May 21st, 1881	$150 00
For eleven days' office work in platting maps, etc., at $5 per day, to June 3d, 1881	55 00
For traveling expenses	9 50
Total	$214 50
Received in advance	100 00
Due and unpaid	$114 50

The above is a just and correct account of expenses incurred and rates of charges agreed upon with both parties in the suit previous to undertaking the work.

(Signed) BENJ. McLAREN,
U. S. Deputy Surveyor.

Received payment in full.

(Signed) BENJ. McLAREN.

(Here follow maps marked pp. 37 & 38.)

39 *Defendant's Answer. Filed Dec.* 3, 1881.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL
vs.
GEORGE D. CRAGIN. } No. 9177.

The amended answer of George D. Cragin, defendant, to the amended bill of complaint of C. L. Powell *et al.*, complainants.

To the honorable the judge of the United States circuit court for the 5th circuit and eastern district of Louisiana:

This defendant, not admitting or confessing any of the allegations of said bill and reserving all objections and exceptions to the many errors and uncertainties therein, for answer unto the same, says—

1st. That the lands of this respondent and those claimed by complainants were surveyed and laid off in subdivisions in township No. 20 as part of the public domain of the United States subject to sale on or about the — day of ——, 18—; that the survey plat was

duly filed in the proper land office of the district in which the same were situated, and that said lands were offered by the United States for sale in accordance with said survey plat, which is the only survey plat ever officially made of said township, and this defendant shows that John Morris Bach, as he is informed and believes, entered the following parcels and subdivision of said township about the year 1841, and that patents were issued to him therefor on the 9th day of July, 1844, viz:

The N. W. ¼ of section 15, range 17 west.
The S. W. ¼ of section 22, range 17 west.
40 The S. W. ¼ of section 16, range 17 west.
The N. W. ¼ " 27, "
The N. E. ¼ of section 21, range 17 west.
The lot No. 1 of section 22, range 17 west.
The S. W. ¼ " 27, "
Lots 1, 2, & 3, in " 34, "
The W. ½, N. E. ¼, of sec. 22, "
The W. ½, S. E. ¼, " 10, "
The N. W. ¼ of section 11, "
The W. ½, N. W. ¼, of section 15, range 17 west.
The W. ½, N. E. ¼, " 27, "
The W. ½, S. E. ¼, " 15, "
The W. ½, S. E. ¼, " 22, "
The N. E. ¼ of section 10, range 17 west.

That the following subdivisions and lots of said township No. 20 were patented to Wm. Craig Mylne on the 1st day of Feb'y, 1840, viz: The N. ½, S. E. ¼ & N. E. ¼, N. W. ¼, of sect. 25, range 17 west; lot No. 2 of section 113, range 17 west; the E. ½, N. E. ¼, of section 25, range 17 west.

That a patent issued to Elisha Stevens on the 6th day of December, 1844, for the east ½ of this N. ¼ of section 11, range 17 west.

And this respondent is now the owner of said land by chain of title from said original patentees.

Respondent further shows that complainants claim title to the lands described in their bill by purchase from the State of Louisiana in the year 1878, and that the State acquired such title as she had by donation from the United States, under the act of 2d March, 1849, the said land being granted to the State as swamp land, unfit
41 for cultivation.

And this respondent avers that both he and complainants thus acquired title from the same source, and, with reference to the location of their respective tracts, relied upon the survey plat as the measure of their title.

2d. Respondent shows that on the original survey plat or map of said township those tracts of land patented to Morris Bach, Elisha Stevens, and Wm. Craig Mylne, as aforesaid, were noted as located on Bayou Grassey (now sometimes called Bayou Four Points), and were sold as so located, and as being above overflow and fit for cultivation, while those donated to the State of Louisiana and since purchased by complainants were designated as swamp lands unfit for cultivation.

3d. Now, this respondent avers that said patentees through whom he acquired his said lands went into possession of such lands about two years prior to the issuance of patents to them under valid entries, and that they and their grantees, down to and including this respondent, have continuously occupied, possessed, and cultivated said lands; that such possession has been public, peaceable, and undisputed, in good faith, as owners under just title translative of property for a period of thirty years and upwards prior to the bringing of this suit and the service of process upon him, and so this respondent avers that he is protected in his title by the double prescription of ten years and of thirty years, and he now pleads the same against the claims of the complainant without waiving, however, any of his other just and legal defenses.

4th. This respondent is advised that complainants' claim that there is an error in the original survey which, if corrected as they
42 wish, to suit their interests, will locate the land acquired by them from the State of Louisiana, as aforesaid, where the lands of your respondent are located in the original official survey plat; and your respondent charges that the whole purpose of the complainants is to obtain a new survey of said township No. 20, differing from the one made by the Government in such manner as will give them the high land now occupied and owned by him, of the value of $5,100 and upwards, in lieu of the swamp land purchased by them from the State of Louisiana, of a small value.

Now, respondent avers that such pretensions are inequitable and unjust and should not be tolerated in a court of equity.

5th. Respondent avers that he is entitled to hold and possess his said lands in accordance with the tracings of the subdivision of said township as noted in the said original survey plat, and that this court cannot and should not sanction any pretended corrective survey to the prejudice of his vested rights. Your respondent is advised that at one time the Government began a system of resurveys of the townships west of the Mississippi river, in 1849, upon the representations of interested parties that there were errors in the original surveys, but that the work was discontinued before it reached township 20, on the ground that it was considered better policy to allow original surveys to stand, even though erroneous, than to attempt corrective surveys which would cause confusion and work injustice to private vested rights; and respondent shows that this policy has since been adhered to by the executive departments of the United States Government.

43 6th. Your respondent shows that if the lands claimed by complainants are in fact located in Bayou Grassey under any so-called corrective survey, and cover any part of ground possessed by him, they were not swamp lands within the meaning of the act of 2d March, 1849, and did not pass to the State by the terms of said act.

And respondent further says that all lands held or claimed by individuals at the date of the passage of said act of 1849 were excepted from the grant to the State by the 2d section, and that inasmuch as respondent's grantors were in possession of their said

lands and held and claimed the same they did not come within the terms of the grant to the State of Louisiana.

Your respondent therefore avers that the complainants' title, whatever it is, is inferior in law and in equity to his own; that it has not been the policy of the Government to donate any lands to the States except swamp lands, nor to make grants of swamp lands to the prejudice of actual settlers holding prior patents, as is evident from the terms of the 2d section of said act of 1849.

And, having fully answered the complainants' bill or so much thereof as this respondent is advised it is necessary for him to answer, he prays to be hence dismissed with his legal costs and charges.

(Signed) G. D. CRAGIN, *Respondent.*
ROUSE & GRANT, *Solicitors.*

44 UNITED STATES OF AMERICA, } *ss:*
Eastern District of Louisiana, }

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.* }
vs. } No. 9177.
GEORGE D. CRAGIN. }

George D. Cragin, defendant, being first duly sworn, says that the matters and things stated in the foregoing, answer so far as stated of his own knowledge, are true, and that so far as stated upon information he believes them to be true.

(Signed) G. D. CRAGIN.

Subscribed and sworn to before me this 24th day of November, A. D. 1881.

[SEAL.] (Signed) OCTAVE MOREL,
Notary Public.

Replication to Defendant's Answer Filed Dec. 12, 1881.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.* }
vs. } No. 9177.
GEORGE D. CRAGIN. }

The replication of Christian L. Powell, Joseph O. Ayo, and Ludger Gaidry, plaintiffs, to the answer of George D. Craigin, defendant.

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereto, say that they will aver
45 and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied

unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

(Signed) J. S. & J. T. WHITTAKER,
For Complainants.

Motion to Homologate Report of Surveyor. Entered and Filed November 7, 1881.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

On motion of J. S. & J. T. Whittaker, of counsel for plaintiffs, and on suggesting to the court that heretofore, to wit, on the 2d day of May, 1881, a surveyor was appointed, at the instance of plaintiffs, for the purpose of determining the boundary lines between the properties of plaintiffs and defendant, and on further showing that by consent of parties Benjamin McLeran, United States surveyor, was selected and appointed surveyor for the purpose named by order of court, and on the sixth day of June, 1881, that said Mc-
46 Leran made the report of his proceedings, under the order appointing him, and filed the same in this hon. court—

It is ordered by the court that defendant show cause on Saturday, the 19th day of November, 1881, at 11 o'clock, why said report, filed as above, should not be approved and homologated as being a true and correct survey in the premises.

Opposition to Survey and Report. Filed May 30, 1882.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

Now comes defendant and opposes the approval of the survey made by Benj. McLeran, and his report of the boundary line, for the following reasons:

1st. Because it appears from said report and the evidence taken in this cause that said surveyor has attempted to correct the alleged errors made by the original surveyors, instead of retracing the old lines established by them, as will more fully appear by reference to his written report accompanying the plats filed.

2d. Because said McLeran was not authorized to correct the Government survey of township 20, even if erroneous, in such a manner as to divest rights acquired under such surveys.

by my survey in the case. The heavy red line, which connects A with the line of dispute, represents also a course measured over by my survey in the case, not hitherto reported, which confirms the location by the first-mentioned course.

A and B are the nearest corners of the original survey, and therefore are made to control the location of the land in question.

According to this theory the line of division between the complainants begins at the E. ¼ sec. post of sec. 10, T. 20 S., R. 17 E., at a distance of one and a half miles from the 4th mile post, B,
49 of the original survey; thence west ¼ of a mile, and thence south two and a half miles through sections 10, 15, & 22, as described in map No. 2.

It appears that Bayou Four Points was erroneously reported by the original survey. It was not meandered, and therefore cannot be made the basis of location for the sections through which it has been drawn on the map.

In the maps herewith presented I have omitted the connection with the upper front corner of the Louis Cossier grant, shown on a previous map, because said corner was not one of the corners of the original survey.

Most respectfully submitted.

(Signed) BENJ. McLERAN,
U. S. Dept. Surveyor.

(Here follow maps marked pp. 50 & 51.)

52 *Defendant's Exceptions to Original & Supplemental Reports of Benjamin McLeran on Question of Boundary. Filed February 5th*, 1883.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

Now comes defendant, by Rouse & Grant, his solicitors, and excepts to the additional and supplemental report of Benjamin McLeran on the question of boundary submitted to him—

1st. Because said supplemental report does not locate defendant's lands according to the original survey, as directed by the court.

2d. Because the said survey and report do not establish any single corner of township No. 20 as an initial or starting point of the survey.

3d. Because said survey is in effect a corrective survey, and does not conform to the original Government survey, but locates defendant's lands at a place different from that shown on the official map under which both plaintiff and defendant acquired their titles from the United States.

4th. Because said survey gives land sold to defendant as high land, fit for cultivation, to the plaintiff in lieu of land granted to the

unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

(Signed) J. S. & J. T. WHITTAKER,
For Complainants.

Motion to Homologate Report of Surveyor. Entered and Filed November 7, 1881.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

On motion of J. S. & J. T. Whittaker, of counsel for plaintiffs, and on suggesting to the court that heretofore, to wit, on the 2d day of May, 1881, a surveyor was appointed, at the instance of plaintiffs, for the purpose of determining the boundary lines between the properties of plaintiffs and defendant, and on further showing that by consent of parties Benjamin McLeran, United States surveyor, was selected and appointed surveyor for the purpose named by order of court, and on the sixth day of June, 1881, that said Mc-
46 Leran made the report of his proceedings, under the order appointing him, and filed the same in this hon. court—

It is ordered by the court that defendant show cause on Saturday, the 19th day of November, 1881, at 11 o'clock, why said report, filed as above, should not be approved and homologated as being a true and correct survey in the premises.

Opposition to Survey and Report. Filed May 30, 1882.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

Now comes defendant and opposes the approval of the survey made by Benj. McLeran, and his report of the boundary line, for the following reasons:

1st. Because it appears from said report and the evidence taken in this cause that said surveyor has attempted to correct the alleged errors made by the original surveyors, instead of retracing the old lines established by them, as will more fully appear by reference to his written report accompanying the plats filed.

2d. Because said McLeran was not authorized to correct the Government survey of township 20, even if erroneous, in such a manner as to divest rights acquired under such surveys.

3d. Because said McLeran has not retraced the lines of the
47 Government survey or run any of the interior lines of the township according to such survey and the field notes thereof, but has in effect made a new survey of said township to suit his own ideas of what the Government survey should have been.

4th. Because the so-called corrective survey made by said McLeran gives the land purchased by the defendant's grantor from the United States on the strength of a Government survey as land above overflow to the plaintiffs who purchased swamp land from the State.

5th. Because this defendant is made to lose his land merely on the difference of opinion between said McLeran and the Government surveyors.

6th. Because defendant should not be disturbed in his possession by any survey which does not clearly establish the old lines, or be deprived of his property by a corrective survey.

7th. Because said survey and report of said McLeran are manifestly erroneous on their face.

Wherefore defendant prays that said survey and report be set aside and disapproved.

(Signed) ROUSE & GRANT,
For Defendant.

Report of Ben. McLeran, D'y U. S. Surveyor, with 2 Maps. Filed Dec. 19, 1882.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.* }
vs. } No. 9177.
GEORGE D. CRAGIN. }

48 NEW ORLEANS, LA., *Dec. 18th*, 1882.

To the Honorable Judge Billings, judge of the United States circuit court, dist. La.:

In obedience to instructions of your honorable court to make a report showing with precision the location of the lands of the complainants under the original survey in the case of C. L. Powel *vs.* Geo. D. Cragin I have the honor to submit two maps with explanations, as follows:

First. Map No. 1, being a copy of the original survey of the lands in question, with the erroneous location of a bayou, now known as Bayou Four Points.

Second. Map No. 2, a survey by order of this court, giving the true location of said bayou, but otherwise agreeing with map No. 1.

Points A and B, common to both maps, represent corners of the original survey, and upon both maps are at the same distance from the lands of the litigants.

Upon map No. 2 a heavy black line, which connects A with B and B with the line of dispute, represents a course measured over

by my survey in the case. The heavy red line, which connects A with the line of dispute, represents also a course measured over by my survey in the case, not hitherto reported, which confirms the location by the first-mentioned course.

A and B are the nearest corners of the original survey, and therefore are made to control the location of the land in question.

According to this theory the line of division between the complainants begins at the E. ¼ sec. post of sec. 10, T. 20 S., R. 17 E., at a distance of one and a half miles from the 4th mile post, B;
49 of the original survey; thence west ¼ of a mile, and thence south two and a half miles through sections 10, 15, & 22, as described in map No. 2.

It appears that Bayou Four Points was erroneously reported by the original survey. It was not meandered, and therefore cannot be made the basis of location for the sections through which it has been drawn on the map.

In the maps herewith presented I have omitted the connection with the upper front corner of the Louis Cossier grant, shown on a previous map, because said corner was not one of the corners of the original survey.

Most respectfully submitted.

(Signed) BENJ. McLERAN,
U. S. Dept. Surveyor.

(Here follow maps marked pp. 50 & 51.)

52 *Defendant's Exceptions to Original & Supplemental Reports of Benjamin McLeran on Question of Boundary. Filed February 5th*, 1883.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.* } No. 9177.
vs.
GEORGE D. CRAGIN. }

Now comes defendant, by Rouse & Grant, his solicitors, and excepts to the additional and supplemental report of Benjamin McLeran on the question of boundary submitted to him—

1st. Because said supplemental report does not locate defendant's lands according to the original survey, as directed by the court.

2d. Because the said survey and report do not establish any single corner of township No. 20 as an initial or starting point of the survey.

3d. Because said survey is in effect a corrective survey, and does not conform to the original Government survey, but locates defendant's lands at a place different from that shown on the official map under which both plaintiff and defendant acquired their titles from the United States.

4th. Because said survey gives land sold to defendant as high land, fit for cultivation, to the plaintiff in lieu of land granted to the

State of Lousiana as swamp lands and sold by said State to plaintiff as swamp land.

5th. Because it is unjust and inequitable to give plaintiff
53 an advantage over defendant on account of an error in the United States survey, if one exists.

6th. Because said survey of McLeran is uncertain, insufficient, and irregular, and should not be the basis of a decree ousting defendant of his ancient possession.

(Signed) ROUSE & GRANT, *Att'ys.*

Complainants' List of Evidence Filed Feb'y 5th, 1883.

United States Circuit Court, Eastern District of Louisana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

Evidence on the part of plaintiffs.

Titles:

Letter of McLeran, surveyor, to surveyor general and his reply.
Ex. G, act sale.

Report of survey of McLeran and two maps, ~~0~~ X 3

Certificates of lands selected as swamp lands by U. S. register of La.

Letter of Williamson, commissioner, to Hon. J. H. Acklen.
Evidence of B. McLeran.
" " G. L. Powell.
" " Thos. E. Raby.

54 *Complainants' Evidence. Filed Feb'y* 5, 1883.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

Additional evidence offered by complainants. 5th.

Report of Benjamin McLeran, filed Dec. 10th, 1882.
Maps Nos 1 & 2 connected therewith.
Evidence of Benjamin McLeran, filed Jan'y 20, 1883.

EXHIBIT F. Offered by Complainants March 8, 1882.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Dec.* 31, 1880.

Hon. J. H. Acklen, House of Representatives.

SIR: I have the honor to acknowledge the receipt, by reference, of a letter addressed to you, under date of the 19th instant,
55 by C. L. Powell, of Houma, Louisiana, relative to E. ½ of S. E. ¼ sec. 10, E. ½ of E. ½ sec. 15, W. ½ of S. W. ¼ sec. 16, E. ½ of E. ½ sec. 22, and W. ½ of W. ½ sec. 23, T. 20 S., R. 17 E., southeastern district, west of river.

In reply you are advised that described tracts were selected as swamp and overflowed lands enuring to the State of Louisiana under the act of March 2, 1849, and, with the exception of W. ½ of S. W. ¼ sec. 16, are embraced in the list approved by the Secretary of the Interior May 6, 1852. Under the act this approval has the force and effect of a patent, and the fee simple to the lands vested in the State, subject to the disposal of the Legislature; consequently they are now beyond the control of this office.

The claim of the State under the swamp grant to W. ½ of S. W. ¼ sec. 16 was rejected Oct. 14, 1852, for the reason that said tract had been reserved by law for schools prior to March 2, 1849.

Mr. Powell's letter to you is herewith returned.

Very respectfully your ob't servant,

J. A. WILLIAMSON,
Commissioner.

EXHIBIT G. Offered by complainants and objected to by defendant, March 8, 1882, at examination before K. Loew, commissioner.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

56 HOUMA, TERRE BONNE PARISH, LA., *May* 7, 1881.

Hon. O. H. Brewster, U. S. surveyor general, New Orleans, La.

SIR: I am to commence work Monday. I learn from reliable sources that (see diagram) the Gorlinski lines are the only ones that can be identified; that there are two points, A and B, common to

both the Gorlinski and Connelly surveys. I am also informed that there is almost no resemblance in contour of bayous to the map of Connelly. I shall first proceed to satisfy myself of the fact by meandering down the whole length of Bayou Salé and, perhaps, Ridge No. 3 of bayou, said to run course of dotted line. It now occurs to me, if I find a general resemblance of the main bayous to the Connelly map, that I ought to commence at B, and upon that construct the line in dispute marked in red. In case no such resemblance or evidence of line having been run, I would start from Gorlinski line as a base, and from C run a due south course the proper distance, and from this set out line in dispute. I am aware that the latest instructions require new surveys to commence from the southeast corner. Still, by reason of the valueless nature of the land in south and west side of this township, as well as the difficulty of running over those lines, would it not be less likely to disturb residents of the soil to base the survey of sections as last mentioned? for it seems probable that if the initial point of subdivision be the S. E. cor. not a single original settler could hold title to his improvements. In order to make the proposed survey of disputed line correct and such as will in the future stand, I desire to obtain from you an
57 opinion as to how I should proceed. This I, of course, only expect informally, and should not use in any other way than to aid me in making a good survey.

Please reply at once.

Very respectfully,

(Signed) BENJ. McLERAN,
U. S. Deputy Surveyor.

U. S. SURVEYOR GENERAL'S OFFICE,
NEW ORLEANS, *May* 9, 1881.

I have carefully read your letter and the conclusions therein expressed, and approve the course you propose in every detail.

(Signed) O. H. BREWSTER,
U. S. Surveyor General, La.

58 *Testimony for Complainants.*

United States Circuit Court, Fifth Circuit, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAIGAN. } No. 9177.

Witnesses: C. L. Powell, Thomas Raby.

Filed June 2d, 1882.

T. V. COUPLAND, *D'y Clerk.*

59 United States Circuit Court, Fifth Circuit & Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAIGAN. } No. 9177.

Testimony taken on behalf of complainants, by consent, at the office of Rouse & Grant, Esqrs., No. 3½ Carondelet street, this 26th day of May, 1882.

Present: J. S. Whittaker, Esqr., for complainant; William Grant, Esqr., for the defendant.

C. L. POWELL, complainant, being sworn and examined in his own behalf, says:

By Mr. WHITTAKER:

Q. You are one of the plaintiffs in this case?
A. Yes, sir.
Q. What is your business?
A. I am a United States surveyor.
Q. Where do you reside?
A. At Houma, parish of Terre Bonne, Louisiana.
Q. Are you not familiar with the lands in controversy in this case?
A. I am.
Q. As also with the Dulac plantation?
A. Yes, sir.
Q. How is that familiarity acquired?
A. By surveying it in the township where it lies.
Q. Did you reside in the neighborhood at any time?
A. Yes, sir; I have resided there in 1878.
60 Q. A. Where did you reside?
A. On the Dulac plantation.
Q. What are the principal water-courses of the township on which these lands —?
A. The principal water-courses on which these lands are located are Bayou Four Points first and Bayou Salé easterly. The Bayou Four Points runs into the Bayou Salé. Then there is a bayou between the Bayou Laceré and the Bayou Four Points, running north and south and emptying into the Bayou Laceré. Some call it the Grand bayou, and I believe that is the only name I heard it called by. Then comes the Bayou Laceré. There is a connecting link between the Bayou Laceré and the Bayou Four Points, below the entry of Grand bayou into Bayou Laceré, south of the mouth of the Grand bayou, about six or seven arpents long, which has a good channel, by which produce is brought from Bayou Laceré to the Bayou Grand Caillou, about five miles above the junction of Bayou Salé and Bayou Four Points.
Q. The Bayou Salé lies in what direction from Bayou Four Points?
A. East.

Q. How does Bayou Laceré lie?

A. West.

Q. How does the Grand bayou lie?

A. Between Bayou Laceré and the Bayou Four Points.

Q. Have you ever heard any other name given to it than Grand bayou?

A. No, sir; I think it is a bayou but very little known. It may be on another plantation.

Q. How long have you been acquainted with this particular parcel of land—the six hundred and thirty-five acres that you now claim?

61 A. I have been acquainted with the facts appertaining to these lands——

Q. How long have you known these lands?

A. Since 1871.

Q. State from your knowledge and observation when the first clearing was made by anybody, which you here claim.

A. I think it was done by people employed — or the lessees of Mr. Craigan.

Q. Do you know anybody by name?

A. Yes, sir; I know Mr. Ozier.

Q. When did he commence his clearing?

A. He commenced clearing on the western bank of the Bayou Four Points, immediately below McLellan, in 1877.

Q. There is another man spoken of—Mr. Cenac?

A. He lives at the southern part of the plantation of Mr. Craigan. Mr. Craigan has a few fractional sections next to Mr. Cenac.

Q. Is that a part of the land you are claiming here?

A. No, sir; it is partly his own land and partly Mr. Craigan's. I believe his residence is on Mr. Craigan's land, and the sugar-house and the orange grove of Ned is below.

Q. The orange grove of Ned, where is that?

A. On Mr. Cenac's land.

Q. What is the distance between the tract you claim in this case and the Bayou Salé?

A. I suppose from the eastern boundary would be about half a mile from Bayou Salé.

Q. How far is the western boundary of that tract from Bayou Salé?

62 A. Well, not having made any measurements, could not tell, except by guess; but it is between fifteen and twenty arpents.

Q. Can you state whether any part of the Bayou Four Points runs through any part of the Dulac plantation that is not included in your claim?

A. The Bayou Four Points starts out by the Dulac and runs through Craigan's plantation until it strikes my upper line; then after it leaves my western line it enters Craigan's lands again. He has a few fractional sections lying on the Bayou Four Points, leased to Cenac.

Q. Into what stream does the Bayou Four Points flow?

A. Into the Bayou Salé, about six miles below my lower lines. The Bayou Salé and Four Points empty into the sea.

Q. Into what stream of water flows the Grand bayou?

A. Into the Bayou Four Points.

Q. You have mentioned another bayou; into what does that run?

A. The connecting bayou that Mr. Craigan speaks of is in front of Mr. Cenac's house, on the Craigan property, and is about four or five miles from where the Bayou Salé and the Bayou Four Points join.

Q. Do you know whether this property was not at this time occupied and cleared by a man named Grey?

A. After Mr. Craigan purchased the property I believe Mr. Craigan placed the Greys there to clear up some land?

Q. What point was that?

A. That was on my land, immediately between where my line passes east of the Four Points, close to his plantation.

Q. When was that?

A. That was, I suppose, in 1875 or 1876.

Q. Have there been any other occupants on these lands
63 excepting those you have mentioned?

A. I have never seen any other occupants on these lands except the Greys and Mr. Ozie. Since Mr. Ozie gave up the place the lands below Mr. Ozie are rented by other settlers, who cleared the land and cultivated it; but below the line of Mr. McLeran, on the southern part of our place, on Mr. Craigan's lands, there were two or three squatters, that I remember, in 1871 or 1872, but the lands immediately above our line were first cleared by a man named Dubois, and that was, I believe, in 1876 or 1877.

Q. What is the fact in regard to the name of the Bayou Four Points—is it called by any other name?

A. I never heard it called by any other name.

Q. I notice on this map that the name Bayou Gracie is used. What do you know about that?

A. I have seen that word Gracie used for several bayous on this map, and the general impression is these names were given here in the city, when the plans were made, without a knowledge of the names of the bayous.

Q. Look at that map. I notice a bayou that runs through sections ten, fifteen, and twenty-two, which is called Bayou Gracie. What is that bayou?

A. I think it must have some connection with this Grand bayou.

Q. Is that or not the Four Points bayou?

A. That is not the Four Points bayou.

Q. Give the reason why.

A. Because the Bayou Four Points starts about the Bayou Dulac and joins the Bayou Salé down in sections between townships 21 and 17. I do not perceive any Bayou Four Points on this map,
for the reason that the Bayou Four Points joins the Bayou
64 Salé in township 21, range 17 east, section 10.

Q. Look at that map and see if the Bayou Salé is anywhere placed upon it.

Mr. Grant objects to the question as leading.

A. The Bayou Salé is a bayou, as near as I can recollect, called the Bayou Gracie.

Q. It was on this Bayou Four Points that Mr. Ozie cleared the lands and Mr. Grey also cleared some lands?

A. Yes, sir.

Q. This Bayou Four Points, in point of fact, is the bayou running south from the sugar-house of Mr. Craigan on the Dulac plantation?

A. No, sir; it runs from the Bayou Dulac by the sugar-house in a southeastern and southwestern direction.

Q. In point of fact, then, Mr. Craigan's sugar-house is on the Bayou Four Points?

A. Yes, sir; close to it.

Q. He cultivates the land on the Bayou Four Points above the place where you say your land is located?

A. Yes, sir.

Q. Below the place also where you say your land is located?

A. Yes, sir; but the land that Mr. Craigan cultivates below he has not continued anything. The bayou is marked on the map.

Q. Among other words you have sworn that this bayou on the map is incorrectly entered there—this bayou which appears to occupy the position of the Bayou Four Points?

A. It is nearly correct, if you take the relative connections with the Grand bayou as with the branch that appears in section No. 10.

Q. How did you discover this apparent error in the Gov-
65 ernment *service*?

A. By surveying there.

Q. When?

A. Well, I believe I have surveyed, off and on, there since 1874.

Q. Were you not employed by Craigan to make a survey of the Dulac plantation?

A. Yes, sir.

Q. When was that?

A. I believe it was in the fall of 1877.

Q. It was after that that the entry was made by Mr. Wolf?

A. I believe it was before the entry was made by Mr. Wolf.

Q. You advised Mr. Wolf to enter these lands, as you thought it would take in a portion of the Dulac plantation?

A. Well, I advised Mr. Craigan. I was surveying the Dulac plantation and discovered six hundred and forty acres were State lands; that the bayou had been omitted entirely, and I requested Mr. Craigan to let me go to the city and enter the lands for him, as he would by doing so save a great deal of money and trouble. I told him at the same that the information was not my property and I would have no right to use it at that time, but if I did consider it my property he should not have it for less than $5,000. Mr. Craigan treated my information with contempt and told me that I had better take up the entry business. I knew nothing of any corner on the plantation, and I took this for granted as being equivalent to a discharge from my contract, and Mr. Wolf entered

these lands. Mr. Craigan never paid me to complete the work and ignored my information. I deal in State lands—that is, make entries of land at the land office for parties desiring to purchase from the State of Louisiana or from the United States or intervene in private land transactions.

Q. You advised Mr. Wolf, then, to purchase these lands, because, in your opinion as a surveyor, under the survey here executed——

66 A. I do not know that I have given my advice on that ground.

Q. Do you know of any attempt of your own? When you cleared these lands of the State they were advertised as swamp lands?

Mr. Whittaker objects on the grounds as heretofore urged.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.* vs. GEORGE D. CRAGIN. } No. 9177.

NEW ORLEANS, *May* 29, 1881.

Testimony for defendant (?) resumed this day at the office of J. S. Whittaker, Esqr., 28 Carondelet St.

Present: J. S. Whittaker, Esqr., for defendant (?); William Grant, Esqr., for complainants (?).

THOMAS RABY, being properly and duly sworn, says—

By Mr. WHITTAKER:

Q. Where do you reside?

A. On Bayou Dularge, parish of Terre Bonne.

Q. How long have you resided there?

A. I resided in the parish, in Dularge, a year before the war and came back after the war, and have been residing there ever since last year, when I came back, and am living there now.

Q. Are you familiarly acquainted with the localities in the sections known as townships 20 and 21?

67 A. I do not know much about the townships. I am not very familiar with their lines, but I know the general course of all these bayous. I am familiar with them in that section of the country, but the township lines I do not know much about.

Q. Do you know where the Bayou Four Points lies?

A. It joins with the Bayou Salé, and they continue along down and empty into the open bays on the sea-shore.

Q. What bayou is to the east of the Bayou Four Points?

A. Bayou Salé is to the east.

Q. What distance?

A. It varies. Here below they nearly come together. I suppose a mile or a mile and a half; I don't believe they are any more than two or two and a half miles apart.

Q. Do you know where the Bayou Laceré is?

A. Yes, sir; it lies west of the Bayou Four Points.

Q. Is there any bayou lying between the Bayou Four Points and Bayou Laceré?

A. Yes, sir; one called the Grand bayou.

Q. What is the general direction of these bayous—courses?

A. Their general course is from north to south.

Q. Is there any other bayou that you know of in the neighborhood of Bayou Laceré that lies between Bayou Laceré and Bayou Four Points?

A. Yes, sir; of Grand bayou; I do not know of any, except the Grand bayou.

Q. Do you know any other bayou down in that neighborhood at all?

A. Yes, sir; I do. Bayou Caillou and another little one called Bayou Platte, which goes from Bayou Laceré south.

Q. Do you know of a bayou known as Gracie bayou?

A. Yes, sir; that is east of Bayou Salé, and runs in a south-
68 easterly direction from Bayou Salé and joins Bayou Salé.

Q. Do you know when the first cultivation was made on the Bayou Four Points by any one?

A. As to the first cultivation, I cannot say; I do not know who did it. I believe there were some little patches down there in cultivation before I went there, when the plantation belonged to Mr. Pelton, but I would not be positive of how much; but there was no great cultivation done on the place until six or seven years ago.

Q. Who was the first man you know of that went to cultivate?

A. At what part of Four Points bayou?

Q. I mean the west point of the Four Points bayou, towards Mr. Craigan's place.

A. I cannot say that.

Q. Do you know Mr. Ozie?

A. Yes, sir.

Q. Where did he settle?

A. In the Four Points.

Q. How long ago?

A. About six or seven years ago, I think.

Q. Do you know of Mr. Cena settling there?

A. Yes, sir.

Q. Where was he?

A. He was below.

Q. How far above this point where Mr. Ozie settled?

A. About two miles, I think, or two and a half.

Q. Do you know of any other persons who settled down there?

A. Yes, sir; numbers of small farmers settled down the bayou, but I do not know them much by name. They cultivated little tracts.

69 Q. Will you examine the map which I now show you, which represents the colony to-day, and state if you know anything about that? Do you see anywhere the Bayou Four Points described on that map?

A. There is Grand bayou running down this way. No, sir; I do not see any bayou representing the Four Points bayou on that map, but I recognize all the rest of these bayous.

Q. State whether you find on that map the Bayou Salé.

A. I do; here it is.

Q. On which side of the map?

A. On the east side. It is marked Gracie bayou here, but this where joined runs southeast. The one that runs southeast might be called Gracie bayou and is Gracie bayou, but this one is Bayou Salé. The Bayou Laceré starts from section 9. I recognize this as the Bayou Laceré on this map.

Q. You recognize it as being in proper place?

A. Yes, sir; it is called the Bayou Salé here.

Q. From the point you fix as Bayou Salé there is another Bayou Salé, and the one that you say is Bayou Laceré—there is another bayou running south called the Gracie bayou, but what is that called on that map?

A. That bayou is called Grand bayou.

Q. What does it run into?

A. It empties into Bayou Laceré. It falls right into it.

Q. State into what bayou the Four Points empties?

A. I think that Four Points bayou and the Bayou Salé join together and empty into the open bays of the Gulf of Mexico.

Q. I understand you to say you do not find the Bayou Four Points on that map?

70 A. No, sir; I cannot recognize it. It may have been marked as Four Points, but the general turns as there are too abrupt. It makes bigger sweeps—that is, not so crooked between these two bayous. Furthermore, the Bayou Four Points does not empty into the Bayou Laceré. It connects with it by a little connecting bayou.

Q. But it does not empty into it?

A. No, sir; I think not.

Q. Have you been familiar with this country, passing constantly through these bayous?

A. Not constantly, but occasionally.

Q. You know the country?

A. Yes, sir; I am pretty familiar with the country.

Q. Point out on this map, as near as you can, where Mr. Cenac had his settlement.

A. I do not know much about the sections.

Q. Can you tell pretty near about the point upon that map where he settled?

A. I think about in this place, somewhere in section 27; that is about where he located, but I would not be positive.

Q. Will you state whether you recognize upon this map the Bayou Four Points as being in its proper place?

A. Yes, sir; this is Bayou Four Points lying west of Bayou Salé.

Q. You do also recognize the Bayou Salé being in its proper place?

A. Yes, sir.

Q. Do you recognize the Bayou Laceré as being in its proper place?

A. It is not laid down on this map. This bayou on the left of the map called Grand Caillou is Grand Caillou.

71 Q. Will you find on that map Gracie bayou?

A. Yes, sir; here it is in its proper place. It runs south-east of Bayou Salé, through section 24 on the map. I recognize its general direction as being Bay ou Gracie.

Q. Will you see on that map, if you can, where Mr. Cenac resided? I suppose you can tell that better than any other.

A. I don't think this map goes down as far as this place—that is, the lines.

Q. What lines?

A. I mean somewhere in here.

Q. You consider, then, that he resided below section 22?

A. Yes, sir.

Q. Can you point out on that map the locality of the land of Mr. Ozie?

A. Somewhere in section 15,

Q. Was it near the Four Points?

A. Yes, sir; right along about the Four Points, in section 15, on the right and left bank of it. He lived originally on the left hand going down, and afterwards on the right.

Q. What time do you say he settled here?

A. Some six or seven years ago.

Cross-examined by Mr. GRANT:

Q. Do you see on the map filed in this case by Mr. McLeran Grand Bayou?

A. No, sir; for the reason that it enters into Bayou Lacere. I do not see that there.

Q. Where does the Grand bayou of itself rise?

72 A. Somewheres above; I cannot say exactly.

Q. Where does it end?

A. It empties into Bayou Lacere.

Q. Whereabouts?

A. Well, between Grand Bayou and Four Points; I cannot say the distance.

Q. How long is Grand Bayou?

A. I don't know much about that; I went only a mile up.

Q. How wide is it?

A. About as wide as Bayou Lacere.

Q. How deep are they?

A. None of them are deep, but it is as deep as Bayou Lacere.

Q. Is it navigable?

A. Well, for small skiffs.

Q. Does anybody live on it?

A. Only at the mouth, where it joins the Bayou Lacere. There is a man living there.

Q. Witnesses who were born on the Bayou Four Points and who

have lived there all their lives state that there is no such bayou; how do you account for that?

A. I don't know; perhaps you could produce a great many more. I only know its name from hearing others call it so.

Q. Did you not go on to its bend?

A. No, sir; only in a skiff.

Q. Are there any clearings on it?

A. No, sir.

Q. Do these curves hurt it?

A. I don't know that particularly.

73 Q. Do you know the Dulac plantation?

A. Yes, sir.

Q. The Bayou Four Points runs through that plantation?

A. Yes, sir.

Q. Do you know about the sections of that township?

A. Nothing whatever.

Q. Do you know where any particular section is located there?

A. No, sir; I am totally ignorant, so far as sections are concerned.

Q. Do you know where the connecting bayou is between Bayou Four Points and the Bayou Lacere?

A. Well, they say it is at Cenac's place.

Q. Are you sure that the Bayou Four Points does not empty into the Bayou Lacere?

A. I know they connect, but which one empties into the other I would not say; I rather think that Bayou Four Points continues along down, because it is a wide bayou and the other is a little strip.

Q. The Bayou Four Points is considerably the most important bayou between Bayou Lacere and Bayou Salé?

A. Yes, sir.

Q. It is the only bayou between these two which has been occupied and cultivated?

A. Yes, sir; between Bayou Lacere and Bayou Salé.

United States Circuit Court, Fifth Circuit and Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

74 Testimony taken on behalf of plaintiffs, before K. Loew, United States commissioner, by consent of parties, this 7th day of March, 1882.

Present: J. S. Whittaker, Esqr., for plaintiffs; William Grant, Esqr., for defendant.

Mr. Whittaker, on behalf of plaintiffs, offers in evidence Exhibits "A," "B," "C;" also the report of the survey of Benjamin McLeran, marked "D," and the plans "E" and "F" and the Exhibit marked "G."

The Exhibit "G" is objected to by Mr. Grant, for defendants, on the ground that the statements in the report of the surveyor constitutes a mere private communication passing between the officers of the court and the surveyor general of Louisiana, which is not evidence against the defendant for any purpose.

BENJAMIN MCLERAN, being called and sworn—

Mr. Whittaker states—

1st. That he offers this witness to show the condition of this tract of land as he found it, with regard to cultivation and what appearance there was upon it of occupancy at the time he made the survey.

2d. Also to show distinctly through him what plans of survey he used, and how he was led, on inquiry, in making the survey, with regard to the finding of surveyors' lines, posts, starting points, and such like.

75 Mr. Grant, for the defendant, objects to the second offering enumerated above on the ground that, the surveyor being sworn as to the report of his action in establishing the boundary in this case, *and* he cannot vary it, add to it, or take from it; that the survey and the report is still a matter which can be considered by the court in deciding whether the survey was correct or incorrect; in other words, that the returns of the officer, accompanied by the document containing what he has done, constitutes his official act, and that act cannot be varied in any manner whatever by parol evidence.

Q. Will you give a description of that land as you found it, stating its general appearance and order and whether it had been apparently under cultivation, and to what extent? I refer to the land claimed by the plaintiffs.

A. It had the general appearance of being new land—that is, of land that had not been long under cultivation, say several years, merely speaking from the impression such as a surveyor would have, that it has been the new part of the plantation for several years. I cannot say how long, but evidently it would be called new ground; pretty much all of that land would be what we call new ground. I cannot say how many years, but several years. I infer this from the cabins and the number of stumps of old trees, such as we usually see in the clearing, that the land is new; this is evidence that would readily leave the impression with any one that the land was new and not in cultivation for several years. I did not make any inquiry with the view of finding out exactly how new

76 the land was. I speak of the general impression I had in going over the country, that it was land recently cleared. I do not know that I can say anything more.

Q. Did you find any person in occupation of it at the time you were there?

A. Yes, sir; I found numerous cabins and I think I noticed them all on the map. I suppose there were from twelve to twenty families scattered up and down.

Q. Did these cabins appear to be of recent erection, as you observed them?

A. Certainly; almost all of them. I suppose these cabins would not last more than a few years anyhow; they were all temporary affairs.

Q. Did the larger portion of this tract consist, or not, of what we consider as wild and uncultivated land, or what proportion of it was otherwise?

A. There is considerable of the land claimed by the plaintiff that has not been cleared at all—a considerable amount shown on the map—but I judge the greater portion of it has been cleared.

Q. What extent of this land is prairie land, if any?

A. A large proportion of it is prairie land and swamp.

Q. When you speak of prairie land you mean land entirely cleared of trees?

A. Yes, sir; it is trembling prairie, the greater portion of it; that is my recollection.

Q. In making this survey, what plans of survey did you employ or use?

A. I used the field notes of Connelly and Gorlinski.

77 Q. I understand you, then, that you followed the plans of survey that had already been used?

A. Yes, sir; my object was to simply retrace the old survey of the township.

Q. Did you find any starting point of the former survey?

A. My first object was to find the section corner near the line, according to the invariable custom of surveyors; they find the section corner near the line that they desire to survey, and from that I ran about the township and could not find the corner. My next move was to go to the boundary of the township and settle the section line in that way. I did not find the corner upon the township boundary, but I found the two neighboring corners, one set by Jorlinski and the other by Connelly. The boundary by Jolinski ran from the line, and from this point I settled the township boundary; then I started my line from that township boundary. The rule for surveying the interior sections of a township is to find the nearest corner by following it to that; my idea was to find the exterior boundary of the township, and following it find the existing corner and settle the boundary by the two neighboring points to my satisfaction. That is the rule that surveyors generally go by, as they have to settle the original lines. So that, having settled the township boundary, I was then prepared to run off any section in the township.

Q. You found, then, if I understand you right, the point that was identified as being the point made by Connelly and Jolinski?

A. Yes, sir.

78 Q. And you found the other point of departure which you could use in order to make a complete line on the exterior of this township?

A. Yes, sir; the other point of departure being the mile post of this township boundary.

Q. I take it that you followed your survey out on that line until you carried it to the proper mile corner, and then pursued the retracing of the lines according to the old survey?

Q. Yes, sir; very particularly to carry the old survey out on the same theory used by Mr. Connelly. In a new survey the lines would be run differently; but among surveyors in making retraces the rule is to follow the same directions used by the original surveyor. A surveyor first surveying a township begins with the interior boundaries. In this case I had failed to find the old section line when I went to work to find or establish a mile post on the township boundary as a basis from which to run the disputed line. I did that because I considered the only way to made the survey was to make it as the original surveyor did. In the case where original surveys are ordered at the present time by the Interior Department, the rule is to begin at the southern boundary of the township, running the eastern tier first and then running northward; but when these surveys were made many years ago that was not the rule; they commenced at the northern boundary of the township and run southward.

Q. I understand you to say that the present mode of surveying reverses the mode formerly used?

A. Yes, sir.

Q. And you retraced according to the former mode in which
79 that survey was made?

A. Yes, sir.

Cross-examined by Mr. GRANT:

Q. You found the northern boundary of township No. 20?

A. No; I did not find the original marks. I established the line according to rules followed by surveyors—that is, I found the back of the bayou where it ought to be, and found the natural features where they ought to be, but the original traces and lines in this township were gone; but I established that boundary in the same place that Connelly's field notes showed it should be, by the two outside points by Gorlinski and Connelly.

Q. According to Connelly's survey in the field notes, how many chains did the township run east and west from the Bayou Four Points?

A. It does not state exactly here how much, because it seemed unnecessary. I made a great many measurements, but I made them from the point; it is not measured exactly, but it is given in the notes that accompany this survey, in which I state that I ran from this point.

Q. I am speaking of Connelly's survey.

A. Well, Connelly's field notes; I do not recollect now whether Connelly's and Golinski's field notes agree. I actually used Golinski's field notes in topography, but I don't know how Connelly located this canal when he went over it.

Q. You did not establish the eastern or western terminus of the township?

80 A. No, sir.

Q. In order to locate the land claimed by the plaintiffs in the position in which it was placed by the Connelly survey, could you not have run a line south from the north line for the distance of one mile, say, and then run a line east or west until you struck the Bayou Gracie, and from the point ascertained by running that line could you not have located all this section relatively to the bayou in the same position as it was on the map?

A. I don't think you could.

Q. Did not Connelly's survey show the location of each section on that bayou and how many sections eastward and westward of it?

A. Yes, sir; it does; but that is different.

Q. If that is true, would not it be a simple process, by the means suggested by me, for you to locate these lands on the Bayou Gracie just as they were located by Connelly?

A. Well, it would be impossible to do so in this case down here, where there is such a discrepancy in the location of the bayou from what is given in the survey.

Q. You could not do that because the township was never correctly surveyed?

A. Yes, sir; that is my reason, I think.

Q. According to the official survey, sections 15, 22, and 10 where located on the bayou were approximate?

A. Yes, sir.

Q. Would not it be a very simple thing to run down from the northern boundary of township 20 and establish a line clear across the township, showing the divisions by lines running east and

81 west of each section of the town?

A. The difficulty would be that in running from any point you could not put the bayou in the same place as in the Connelly survey.

Q. That is, provided it was admitted that Connelly's survey was incorrect?

A. I consider it incorrect; but some portions of it are more incorrect than others. There is a general resemblance excepting this portion of land in dispute.

Q. I understand you to say that you were unable to find or did not find any one of the four corners of that township 20?

A. No, sir.

Q. You have been able merely to trace the northern line of township 20?

A. Yes, sir.

Q. But without fixing the distance which that line should be, either east or west of the Bayou Four Points?

A. Well, I think it is distinctly fixed, because, as I said before, the point "H" is the point in Connelly's survey, and I have located the township upward from that corner and also from this.

Q. Then you have located the township relatively to the bayous from the survey of Golinski?

A. From the survey of Gorlinski, from these two corners of Con-

nelly, which are identified by Jorlinski; that is the reason why I clung to these corners in my theory of the survey.

Q. You do not claim that you have retraced the section lines in township 20?

82 A. I claim that I have retraced them; certainly.

Q. What lines have they retraced?

A. I have retraced these lines down from the north to the middle of section ten, from the fourth mile post to the middle of section 10.

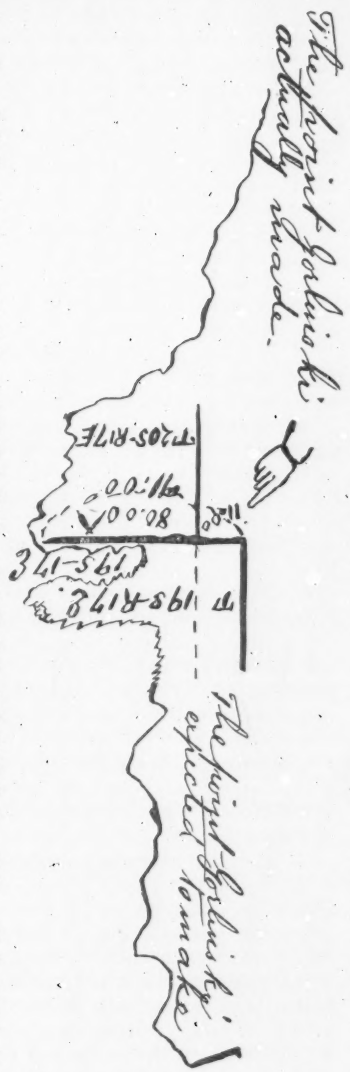
Q. Did you retrace them according to what you thought they ought to be?

A. I followed his field notes, but, as I said before, I did not find any. I was of the opinion when I made the survey that this survey was very loosely made, and it is doubtful, in some parts, if it was ever made. I do not think it was ever made at all where the doubtful lines run. If it was ever made it was made very loosely, but I am very well satisfied as to the position of the fourth mile post, that it agrees with both surveys; but when Gorlinski made his resurvey of the township he expected to come out there (he found himself here), showing that in his previous surveys he was in error—that is, in running the west boundary of said township he expected to make the two townships—the one above and the one below—agree at the corner common to both. As they did not, an error must have been made in previous surveys.

Q. Gorlinski's survey was called the corrected survey of township 19?

A. Yes, sir.

83 Q. Is it not a fact that your survey was intended to carry out that same 19 system as in township 19. Were you not guided by the theory of Gorlinski's survey in making the survey of this line in township 20?



A. Well, I think I surveyed it just as he would. All surveyors, when they make a resurvey of a township, if they cannot exactly

retrace the old lines, locate them in such a manner as to disturb as little as possible the existing improvements.

Q. According to Gorlinski's corrected survey, township 20 S., 17 E., lacked half a mile of being six miles square?

A. That is what he found.

Q. If you went down to locate that particular land on the bayou according to Connelly's survey you could do it, could you not?

A. I do not know as I understand your question.

Q. I mean, by disregarding the general survey of the township or by not making any corrections in the old survey, could you not go down to sections 10, 15, and 22 and locate Cragin's land exactly where the Government found it on that bayou?

A. No, sir.

Q. That is on your theory that the survey of Gorlinski is correct?

A. Yes, sir.

Q. Or on your theory that you should establish the township lines before you located Cragin's land?

A. Yes, sir.

Q. But you do not pretend to say that you could not run a line down from the north—a line of township 20—to the upper line of sections 10 or to the upper line of sections 15 and 22?

A. It would be impossible to run a straight line north and south and strike the bayou at the place given in the field notes of Connelly?

84 Q. You could certainly find by that method, by driving the stake at the other mile post, the lines of what each section should be, because they should be one mile north of the south line?

A. Yes, sir.

Q. Was it not entirely practicable for your line down to section 10 to run to the east or west of the bayou to any point? Do you not also know that if you establish the eastern line of township 19 according to Gorlinski's survey that you would create the whole township westward about one-half a mile?

A. Yes, sir; about one-half mile.

Q. And you have done that?

A. No, sir; I have not.

Q. Would that displace the line that you have made from where it is now?

A. It would throw everything out of place.

Q. Now, it is a rule of law that a deficiency shall always be taken out of the western tier of a section?

A. Yes, sir—that is, of a new survey; but in an old survey you must aim to trace the lines wherever they shall run. Deficiencies are always thrown on the western tier, but this being an old survey the rule followed out in our office is to retrace the lines as near as we possibly can, by which rule the deficiency would be thrown in this case on the eastern tier.

Q. Is it not usual in tracing the old lines simply to make it what any man might call a strictly correct retracing of the old lines, having due regard to vested rights?

A. Yes, sir; it is a difficult matter, as I set forth in the report. If I were to commence with the new and present rule of sur-
85 vey it would make very bad displacements indeed. A great many resurveys have been made by the Government within the last two years and the rule observed was to follow the old line as near as supposed to have been made in the original survey, because it would displace the inhabitants less than if the land were surveyed strictly according to the manual instructions at present.

Evidence of Benj. McLeran. Filed Jan'y 20, 1883.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.* } No. 9177.
vs.
GEORGE D. CRAGIN. }

Evidence taken by consent, January 10, 1883.

Present: J. S. Whitaker, for complainants; Wm. Grant, for defendant.

BENJAMIN MCLERAN sworn:

I am the surveyor appointed to run the boundary in this case. My last report and the plats annexed were made from the field notes of my former and first survey. My former testimony
86 as to the first report applies equally to the last. I have not gone over the land or made any new survey since.

Cross-examined:

My understanding of the order of the court again referring the matter to me as surveyor was to make my former report plainer. My report and plans as made were always on the lines of the Government or Connelly survey, on which the lines were originally entered and sold by the Government of the United Stotes. In this last report I have omitted any allusion to the Gorlinski survey and confined myself strictly to the Connelly survey.

Of the Connelly survey I identified an original corner, being an iron post, and this was the starting point of my survey, on the left bank of the Grand Caillou. I identified another point of his survey, on the right bank of the same bayou, as another starting point. I also identified the 4th-mile corner on the northern boundary of the township, also of Connelly survey.

Redirect:

My present survey establishes the N. E. corner of township 20, as I understand Connelly to have done, but it leaves the same jog in the east meridian line as shown in my first report and maps. The jog was occasioned by a survey of the two townships from different starting points. I found the four-mile post from a reference to both Connelly's and Gorlinski's notes of survey. I did not go to or find any of the four corners of the township.

(Signed) BENJ. McLERAN.

87 *Exhibit Offered by Complainants May* 30, 1882.

Description.	Sec.	T'p.	R.	Area.	Price.	Remarks.
W. ½ of N. W. ¼	9	20 S.	17 E.	80.00		
E. ½ of S. E. ¼	10	"	"	80.00		
E. ½ of N. E. ¼ and W. ½ of S. W. ¼	11	"	"	160.00		
W. ½ of N. W. ¼ and the southwest ¼	14	"	"	240.00		
E. ½ of N. E. ¼ and E. ½ of S. E. ¼	15	"	"	160.00		Selected for the State as swamp land and selection approved by the Hon. Secretary of the Interior May 6th, 1852.
E. ½ of S. E. ¼ and west ½ of	21	"	"	399.63		
E. ½ of N. E. ¼, N. ½ of N. W. ¼, S. E. ¼ of N. W. ¼, and E. ½ of S. E. ¼	22	"	"	280.00		
West ½ of	23	"	"	320.00		
E. ½ of N. E. ¼, W. ½ of N. W. ¼, W. ½ of S. W. ¼, and S. E. ¼ of *sec.*	26	"	"	400.00		
E. ½ of N. E. ¼ and E. ½ of S. E. ¼	27	"	"	239.95		
W. ½ of N. W. ¼, E. ½ of N. E. ¼, E. ½ of S. E. ¼ and S. W. ¼	28	"	"	399.75		

U. S. LAND OFFICE, NEW ORLEANS, LA.,
September 28th, 1881.

I hereby certify that the above-described tracts of land situated in sections 9th, 10th, 11th, 14th, 15th, 21st, 22d, 23d, 26th, 27th, and 28th, in township 20 south of range 17 east, southeastern land district of La., west of the Mississippi river, were selected for the State of Louisiana under the act of Congress of March 2d, 1849, and that such selections were approved by the Hon. Secretary of the Interior May 6th, 1852.

(Signed) GEO. BALDY, *Register.*

88 *Defendant's List of Evidence. Entered & Filed Feb'y* 5, 1883.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEO. D. CRAGIN. } No. 8177.

1. Certified copy of Government plat of the survey of township 20.
2. Evidence of Geo. D. Cragin, Jr.
" Maurice Smith.
" Rich'd Wilson.
4. Admissions of complainant.
5. Evidence of B. McLeran, taken on the 10th day of Jan'y, 1883.

Testimony for Defendant.

Circuit Court of the United States, Fifth Circuit & Eastern District of Louisiana.

C. L. POWELL
vs.
GEORGE D. CRAGIN. } No. 9177.

Manual Smith
Richard Wilson
George D. Cragin

Filed June 2, 1882.

T. V. COUPLAND, *D'y Clerk.*

89 United States Circuit Court, Fifth Circuit & Eastern District of La.

C. L. POWELL
vs.
GEORGE D. CRAGIN. } No. 9177.

Testimony taken on behalf of defendant, by consent, at the office of William Grant, Esqr., 3 Carondelet street, New Orleans, this 26th day of May, 1882.

Present: William Grant, Esqr., for defendant; J. S. Whittaker, Esqr., for the complainants.

MANUAL SMITH, sworn for defendant, says:

By Mr. GRANT:

Q. How old are you?

A. I am over fifty years old. I was bred and born on the Grand Caillou bayou before I knew Mr. Cragin.

Q. Where do you live?

A. On the Grand Caillou.

Q. Have you ever been on Bayou Four Points?

A. Yes, sir; I have been down at almost every point that way.

Q. Does that bayou run through the Dulac plantation?

Mr. Whittaker objects to the question as leading.

A. Yes, sir.

Q. Does or not that bayou run through the Dulac plantation?

90 A. It runs through, but there is a kind of dam—a sort of filling up.

Q. Do you know who had possession of the Dulac plantation before Mr. Craigan went there?

A. Yes, sir; Mr. Pelton, the man that raised me. He was my boss before the war.

Q. Do you know when he took possession first?

A. When I come to my recollection he had charge of the plantation. He had my mother. He bought her. He was the only man that had anything to do with it until Mr. Craigan bought it.

Q. How far back can you remember?

A. Well, about the time when the war was in rank poison. They had taken Port Hudson. I was twenty-four years of age then. I had a brother killed at Port Hudson.

Q. Were you born on the Dulac plantation?

A. Bred and born, yes, sir. I don't know any other place except by driving through the country. That is my natural home. After I came from the army I went back there.

Q. Who owned it, as far as you can remember, since you were a small boy?

A. Mr. Pelton owned it.

Q. And Mr. Craigan succeeded him?

A. Yes, sir; he was the only man I knew to have anything to do with it. Mr. Pelton raised me and I have been working for Mr. Craigan ever since.

Q. Are the lands on each side of the Bayou Four Points cultivated?

A. Yes, sir.

Q. Who is it cultivated by?

A. Mr. Pelton cultivated it when he had some poor people.
91 They just lived upon it in little places down as far as John Cenac. I had charge of the teams that were cutting wood.

Q. Then, it was cultivated in patches as far as Cenac's, from Bayou Four Points?

A. Yes, sir.

Q. For how many years?

A. Well, it comes to my recollection poor people had settled down there now and again. He just told them they could live on it. He did not charge them any rent, but to cut wood. I know Mr. John Cenac cut wood there. He had a lot of orange trees.

Mr. Whittaker objects to the above testimony as hearsay.

Q. Mr. Pelton had orange groves planted there?

A. Yes, sir; he told me he sold them out, but that I don't know.

Mr. Whittaker objects.

Q. Where does Mr. Cenac live?

A. On the lower part of the plantatation Dulac. I think he is on the line of the plantation.

Q. What do you call the lower line?

A. The south end.

Cross-examined by Mr. WHITTAKER:

Q. Have you ever been on the Bayou Salé?

A. Yes, sir; as often as I have fingers and toes.

Q. When you go to that bayou what direction do you go by—east or west? I mean Four Points.

A. You go to the west.

Q. Do you know where Bayou Lacere is?

A. Yes, sir; I hauled many a lot of corn from there.

Q. If you were going from Bayou Four Points what direction would you take to get to Bayou Lacere?

A. I would go to the east.

92 Q. Have you ever been on the Bayou Gracie?

A. What Bayou is that?

Q. Have you ever been on Bayou Gracie?

A. I am not acquainted with that bayou; I do not know but three bayous—Grand bayou, Bayou Lacere, and the Bayou Salé, and the Bayou Four Points.

Q. How far did you ever go down the Bayou Four Points?

A. I went there as far as there were any lands to cultivate.

Q. Did you ever go down to where it empties?

A. To where it empties into the sea?

Q. Have you ever been at that point where the two bayous come together—the Bayou Salé and the Bayou Four Points?

A. No, sir; I have not.

Q. Do you know a place known as the Turnip Patch?

A. In what direction?

Q. Do you know such a place as "Turnip Patch," on the Bayou Four Points?

A. I know a place where they used to have a turnip patch.

Q. Where is that at?

A. Two places we had a turnip patch; one on the Bayou Salé and the other down in the east fork, where Bob Long lived.

Q. Did you know the Greys, a colored family that lived there?

A. No, sir; I don't know any such name as that. I know there were some white people down on the Grand Caillou by the name of Grey.

Q. Do you know where Mr. Ozie first moved there?

A. Yes, sir.

Q. Where was that?

93 A. That was down towards the Four Points.

Q. What point is that?

A. It is right on the road as you go to the Four Points, just this side of Mr. John Cenac.

Q. How far is it from the fields they first began to cultivate before he went to this place of Craigan?

A. Well, if I went to work and try to tell you how many feet I could not do it, but from my judgment, from the way he cultivated there up to the time Mr. Craigan cultivated it, it was about two acres, as near as I can come to it.

Q. Did Mr. Ozie do any clearing in these two acres?

A. Well, there had been men down there clearing a little, but I cannot say that he done so much. I know there was some clearing done before he went there.

Q. And you don't know what he did?

A. No, sir; it slipped from my memory.

Q. When did Mr. Ozie go there?

A. I don't remember what month or year.

Q. How many years ago?
A. You mean the old man?
Q. Yes.
A. I believe between two and three years ago.
Q. Had there been any lands cleared by anybody else when he went down there?
A. Yes, sir; I told you that first there were little patches where the poor people lived—little garden spots. There was a man went there, a white man; I don't remember his name.
94 Q. What other man went down there besides the white man that had the garden spot?
A. I don't know.
Q. Do you remember when Mr. Ozie crossed the Bayou Four Points and cleared up the land?
A. That was on the bayou that he did cross to clear up. There was a piece there in cultivation, and he fell down below that he cleared up and never made a crop. He planted cane and corn that year.
Q. As to Mr. Ozie—is he the overseer or manager of Mr. Craigan?
A. No, sir; he was hired the same as I was; he was a man that rented the land.
Q. What were the terms upon which he took the lands?
A. I do not know; that was not my business. I did not ask him about that.
Q. Have you ever been on the Bayou Salé?
A. Yes, sir.
Q. How do they travel on that bayou?
A. You can travel on both sides of the bayou, and on each side of that bayou there are good lands?
Q. How do you travel on the bayou?
A. At some places you can get along with a little pirogue, but you get an outlet into the lake.
Q. How do they travel on the Bayou Four Points?
A. The same way; sometimes you can travel on a small boat.
Q. Is Bayou Four Points larger than Bayou Salé or not?
A. It is larger.
Q. Which is the largest?
A. The Bayou Four Points is the largest. The Bayou
95 Lacere is a little bayou that does not amount to anything.
Q. Where is Bayou Gracie situated?
A. I do not know; I am not acquainted with that bayou.
Q. Have you ever travelled on the Bayou Lacere in a pirogue?
A. No, sir; I just went along the road on horseback.

RICHARD WILSON, a witness produced, sworn, and examined for defendant, says:

By Mr. GRANT:

Q. Where were you born and where do you live now?
A. I was born in Norfolk county, Virginia. I was brought here by Mr. Pelton when I was sixteen years of age, and I am up there until to-day.

Q. How old are you?
A. I think about sixty-five years.
Q. Are you acquainted with the Dulac plantation?
A. Yes, sir; I am.
Q. Who owned the Dulac plantation when you went there?
A. A gentleman named John Pelton.
Q. Who succeeded him?
A. Mr. George Craigan.
Q. Do you know the Bayou Four Points?
A. Yes, sir.
Q. Does that bayou run through the Dulac plantation?
A. No, sir; not all the way through; it is a kind of a stopped-up stream; it does not run through exactly.
Q. It is on the Dulac plantation?
96 A. Yes, sir.
Q. Do you know the place called Cenac's?
A. Yes, sir; I am well acquainted with it.
Q. Where is his place located—on the upper or lower line of the Dulac plantation?
A. On the lower line.
Q. Is the land on Bayou Four Points in cultivation from the sugar-house down to Cenac's.
A. Not altogether, but in places and spots the creoles have settled upon it.
Q. Who gave them permission to settle upon it?
A. Mr. Craigan. He must have given them permission, because they were his lands.
Q. How long have these patches been in cultivation, as near as you can remember?
A. I cannot state exactly how long—one or two years. Almost every year somebody comes down there and puts up a little shanty, and so on.
Q. Have they continued to cultivate from the time you first went there?
A. No, sir; not when Mr. Pelton bought me. There was not any opening, only those that he opened. I was chopping wood for him as far as Cenac's.
Q. Do you know whether Mr. Pelton planted any orange groves on the bayou?
A. I do not know whether he planted them or not, but he gave permission to people there to plant them. There was a poor man by the name of Ned to whom he gave permission to plant orange trees or any kind of trees he had a mind to.

97 Cross-examined by Mr. WHITTAKER:

Q. How old are you?
A. Sixty-five, I think—from the time I came to this country. I was sixteen years of age when I left my natural home where I was born.
Q. Were you present when Mr. Pelton gave permission to anybody to occupy these lands that you describe?

A. No, sir; I did not say I was present.

Q. You did not hear him give such permission yourself?

A. No, sir.

Q. You say it was about two years ago or a year or two since they began to go down there and cultivate; were not some people there before that time cultivating lands?

A. Well, there may have been some few down there before that.

Q. Can you mention any one that was there?

A. No, sir; I do not know any of these creoles. I know there was a good deal since that time.

Q. Do you know when Mr. Ozie went down there?

A. Yes, sir.

Q. How long ago was that?

A. I think, about two or three years.

Q. You say there has been a great deal of cutting of wood; where has that wood been cut?

A. I have cut wood down on the Four Points myself. I got permission from Mr. Pelton; who owned it at that time.

Q. How far down the bayou did you go?

A. I don't know how to measure it. I do not know exactly the distance I went, but I went as far as I could go. Mr. Cenac
98 knows more about the distance than I do.

Q. Do you know where the Bayou Salé is?

A. Yes, sir.

Q. In what direction does it lie from the Bayou Four Points?

A. It lies east.

Q. Do you know where the Bayou Lacere is?

A. It is west from the Bayou Salé.

Q. What bayou lies between Bayou Four Points and Bayou Lacere, runnning in the same direction south?

A. Between the Bayou Four Points and Bayou Lacere there is the Bayou Salé on the opposite side.

Q. Do you know Grand bayou?

A. I do not know that; there may be different ways of calling it, but I do not know it by that name.

Q. Do you know Posey, the Indian?

A. Well, I have heard of him, but I am not acquainted with him.

Q. Do you know where he lives?

A. I don't know whether he lives at Bayou Four Points or Bayou Lacere. I am not acquainted with him.

Q. You spoke of an orange grove; who occupied that orange grove that Ned planted?

A. Mr. Cenac is living on the ground where it was.

Q. Whose land is that?

A. Mr. George Craigan's.

Q. Now?

A. Well, Mr. Pelton owned it, and Mr. Craigan next. I know Mr. Craigan owned it when he bought me.

Q. Is that above or below the Cenac sugar-house?

A. I have not been there since he put up his sugar-house.

99 Q. Do you know Gracie bayou?

A. No, sir; not by that name; there may be such a bayou, but not of that name.

GEORGE D. CRAIGAN, sworn for the defendant, says:

By Mr. GRANT:

Q. Are you related to George D. Craigan, the owner of the Dulac plantation?

A. Yes, sir.

Q. How long have you known the Dulac plantation?

A. Since 1870 or 1871.

Q. State whether you were present when the transfer of the plantation was made to your father.

A. No, sir; I was not.

Q. When did your father go into possession of it?

A. I think in the spring of 1872 or the winter of 1871.

Q. Are you acquainted with all the lands cultivated on that plantation?

A. Yes, sir; I am.

Q. How did you become acquainted with them?

A. Through the maps that we had in our possession and the title deeds.

Q. Did you go over it?

A. Yes, sir; most of it.

Q. Who had the management of the place in the absence of your father?

A. I myself.

Q. Are you acquainted with the Bayou Four points?

100 A. Yes, sir.

Q. What is the character of the lands on each side of that bayou?

Mr. Whittaker objects, because the patent granting the swamp lands, under which the complainants hold, cannot be impeached by showing that the lands conveyed be not swamp lands, under the decision in the 3d of Otto, page 169.

A. It is high tillable land.

Q. Are these lands subject to overflow?

Mr. Whittaker objects.

A. Not on the immediate banks.

Q. What is the average depth of the tillable land on each side of the bayou?

Mr. Whittaker objects for the reasons above stated.

A. It varies; in some places it is two acres and in some places it runs in ridges ten or fifteen acres.

Q. Do you know the place called Cenac's?

A. Yes, sir.

Q. Where is that located?
A. It is on our southern line.

Mr. Whittaker objects as being not sufficiently definite.

Q. State whether you have had lands lying on the Bayou Four Points between Cenac's and your sugar-house under cultivation or rented out since the purchase of the plantation?
A. We have; it has not been under cultivation all the time, but it is now. They have not been so all the time; the lower end of that land has been in cultivation since we have had it, adjoining Cenac.

101 Q. Is your sugar-house above or below the line of section 15?
A. It is above.
Q. By what right do the present occupants of the land on each side of the Bayou Four Points hold possession?
A. By leases from my father and myself.
Q. As to Mr. Ozie; it has been stated he occupies a portion?
A. He did occupy, but not now.
Q. By what right?
A. He had a lease; he was cultivating the land on shares.
Q. Do the other leases hold under a cash rent or on shares?
A. A cash rent.
Q. Has any other person during your occupancy occupied or attempted to occupy a portion of these lands?
A. No, sir.
Q. What is the distance from your sugar-house down to Cenac's?
A. About three miles and a half.
Q. Do you know whether the Bayou Four Points is sometimes called the Bayou Gracie?
A. Yes, sir; it is sometimes called the Bayou Gracie, and I believe it is so called on some of the maps.
Q. Is there any other bayou running south through the Dulac plantation?
A. There is a bayou called the Bayou Platte that runs through there from Bayou Lacere to Bayou Four Points.
Q. About how high up on the section?
A. It runs through the land occupied by Cenac; it runs through the Dulac plantation, but it is not on his line.
Q. You think it connects the Bayou Four Points and the Bayou Sale?

102 A. Yes, sir; it is a connecting bayou. I have not been out on it in a boat, but it runs more west than south.

Cross-examined by Mr. WHITTAKER:

Q. This last bayou that you have mentioned, what does it empty into?
A. I think it runs into the Bayou Four Points. I only know about the land on horseback.
Q. Did you ever go to its mouth?
A. No, sir.

Q. So you can not tell?
A. No, sir.
Q. You spoke of having given a lease to Mr. Ozie?
A. Yes, sir.
Q. When did you give that lease to him?
A. I think it was in 1877 or 1878.
Q. You gave a lease also to a man by the name of Cenac?
A. No.
Q. What time did you give that lease?
A. The first lease was given by my brother, and I continued his lease.
Q. State when you gave him the lease.
A. He had the lease when he came there in 1877. I do not know that personally, and I renewed the lease, or my father.
Q. How long had his lease been running when it was renewed?
A. I cannot say, but to the best of my belief I think it was made in 1871.
Q. You think it was?
A. Yes, sir.
103 Q. Can you produce that lease?
A. Yes, sir; I believe I can.
Q. Which side from the Bayou Four Points lies the Bayou Sale?
A. To the east.
Q. Which side does the bayou known as Lacere lie?
A. To the west.
Q. Which side of the Bayou Four Points lies the Bayou Platte?
A. West of the Bayou Four Points.
Q. Do you know how far west of the Bayou Four Points it is?
A. No, sir.
Q. Is that Bayou Platte of any considerable size?
A. No, sir; a small bayou.
Q. Are not all these comparatively small bayous?
A. Yes, sir.
Q. The Bayou Dulac is a large bayou?
A. Yes, sir.
Q. It is away to the west of these bayous that you describe?
A. The Bayou Dulac is north and the Grand Caillou is west.
Q. Did you not state something about carrying sugar through this Bayou Platte?
A. No, sir. Mr. Cenac shipped some of his crops that way, and I always thought that it was the connecting bayou between the Bayou Four Points and Bayou Lacere.
Q. Have you ever followed out the two bayous known as the Bayou Four Points and the Bayou Sale—that is, by going in with a boat or canoe and following it to the outlet?
A. No, sir; not to the outlets, but below our plantation.
Q. You don't know whether the Bayou Four Points enters
104 into the Bayou Four Points or the Bayou Salé?
A. No, sir.

Admissions of Complainants. Offered by Defendants May 30, 1882.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

Complainants admit patents issued from the United States at the dates and for the several tracts of lands described in the defendant's answer, and that defendants acquired title to said land by chain of conveyances from the original patentees.

They further admit that the land claimed by them was donated to the State of Louisiana by the act of 2 March, 1849, and that their grantor acquired title from the State of Louisiana at the date alleged in their bill.

(Signed) J. S. WHITTAKER,
For Complainants.

(Here follows map marked p. 105.)

105½ The foregoing is a true copy of a map offered May 30, 1882, by defendant in suit No. 9177, U. S. district court La., C. L. Powell *et al. vs.* Geo. D. Cragin, by me made this day, August 17th, 1885.

BENJ. McLERAN,
No. 107 *Thalia St., N. O.*

106 *Letter from Hon. Jno. Wilson.*

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

GENERAL LAND OFFICE, *June 27th*, 1855.

Wm. J. McCulloh, Esq., surveyor general of Louisiana, Donaldsonville, La.

SIR: For the purpose of enabling us to confer respecting the surveys, resurveys, and "new proposed surveys" designated in Table C, which accompanied your last annual report, there are herewith transmitted, as per list inclosed, diagrams of such of those townships as are here on file (a printed blank form being used for the purpose), on which have been colored particular tracts of land which have been sold or in any other manner disposed of in said townships and ceased to be the property of the United States.

The confusion and complication existing amongst the Louisiana surveys is lamentable. Surveys and resurveys of the same townships exist wherever the resurveys themselves are in dispute.

Witness, amongst others, the recent case of township 14, S., R. 8 & 9 E., alluded — in your letter of 11th May last, and there is no conjecturing the extent to which such developments may continue to be made. The exhaustive variety of duties and details continually engrossing the time and attention of the limited
107 force in the division of surveys in this office in its relation to the numerous surveying districts, new and old, render it utterly impossible here to enter into all the details of such complications. The making of resurveys or corrective surveys of townships once proclaimed for sale is always at the hazard — interfering with private rights, and the question remains as to what is best to be done in such cases; whether to stay further proceedings in making resurveys or suffer them to go on at the hazard of interfering with private rights and thereby introducing new complications. No reflections are designed to be cast upon any action of yours in the premises, but it is to be feared that were you to undertake all the surveying specified in the Table C aforesaid it might be at imminent hazard (judging from all past action in the State) of introducing new embarrassments while honestly aiming to correct evils of the past. A resurvey, properly considered, is but a retracing with a view to determine and establish lines and boundaries of an original survey. No provisions of law exist on the subject, but it has been assumed that where circumstances render them indispensably necessary it was lawful to make such retracings; but the principal of retracing has been frequently departed from where a "resurvey" (so called) has been made, and new lines and boundaries have often been introduced mischievously conflicting with the old, and thereby affecting the areas of tracts which the United States had previously sold and otherwise disposed of.

Among the thirty-one township diagrams herewith transmitted (which are all found here on file of those enumerated in your Table C) you will perceive the large extent to which individual rights might be interfered with by undertaking resurvey of
108 them. Where much complication exists in the old work it can hardly be expected to stand the test of severe scrutiny as to how far corrections ought to be made at the present time, and, as a general rule, it is deemed best, in view of the principles established by the act of 11th February, 1805, that old work should be permitted to stand in doubtful cases, provided it creates no essential wrong, private or public, however much it may fail to undergo the test of rigid examination, rather than to incur what may likely prove evil consequences attending corrections. Hence, out of abundant caution, this office cannot feel warranted in sanctioning resurveys or corrective surveys of lands in townships wherein sales and appropriations of lands have been made without requiring a special statement setting forth particular reasons clearly and satisfactorily showing the absolute and indispensable necessity now existing for a resurvey or corrective survey in such township without referring to any former reports for explanations heretofore made by your predecessors in regard to the same matters in former years. By this method the more recent experience which your office may have ac-

quired in regard to the character of the surveys in those townships will be set forth with the former in one entire exhibit for each township without referring to series of former reports for particulars.

Very respectfully, your ob't servant,

(Signed) JOHN WILSON,
Commissioner.

SURVEYOR GENERAL'S OFFICE, DISTRICT OF LOUISIANA,
109 NEW ORLEANS, *Nov. 18th*, 1881.

I certify the foregoing to be a true copy from the original on file in this office.

(Signed) O. H. BREWSTER,
Surveyor General La.

Order.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana. November Term, A. D. 1882.

NEW ORLEANS, TUESDAY, 27 *Day of February*, 1883.

Court met pursuant to adjournment.

Present: Honorable E. C. Billings, district judge.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

Ordered, That the ruling on yesterday confirming the report of Surveyor McLeran be treated as an announcement to be dealt with on final decree, and that complainants be notified thereof.

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand and seal of said court, at the city of New Orleans, this 27th day of February, 1883.

[SEAL.] (Signed) T. V. COUPLAND, *D'y Clerk.*

110 *Decree Confirming Report of Surveyor. Entered and Filed* 28 *March*, 1885.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

This cause came on to be further heard at the time, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows, to wit:

That the report of the surveyor, Benjamin McLeran, be confirmed,

and that the bounds and limits between the lands of plaintiffs, C. L. Powell *et als.*, and defendant, George D. Cragin, be determined and fixed as follows: To begin at the half mile point between sections ten and eleven of township twenty, range seventeen east, said point having been fixed by courses and distances of the approved Government survey made by Connelly, and measured from an identified point in the aforesaid survey on the banks of the Bayou Grand Cailliou, and from the half mile point thus established between sections ten and eleven of above township and range thence west twenty chains; thence south forty chains, through said section ten, eighty chains, through section fifteen, eighty chains, through section twenty-two to the end of the line of demarcation between the tracts of plaintiffs and defendant, separating the tract of plaintiffs, consisting of east half of the south end quarter in section ten, the east half of the east half of section fifteen, and the east half of the
111 east half of section twenty-two, from the lands of said defendant in said sections ten, fifteen, and twenty-two; and it is further ordered that all costs incurred in this cause be equally divided between the plaintiffs and the defendant.

(Signed) EDWARD C. BILLINGS, *Judge.*

Motion for Appeal. Entered and Filed 30 *March*, 1885.

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

On motion of Rouse & Grant, solicitors, and suggesting that there is error in the final decree herein rendered against the defendant on the 28th day of March, 1885, to his prejudice, it is ordered that the appeal be allowed the defendant from said final decree, with supersedeas, upon his giving a proper bond in the sum of $1,000.00, returnable to the Supreme Court of the United States on the 2d Monday of October, 1885.

Bond for Appeal. Filed May 1*st*, 1885.

112 UNITED STATES OF AMERICA:

United States Circuit Court, Eastern District of Louisiana.

C. L. POWELL *et als.*
vs.
GEORGE D. CRAGIN. } No. 9177.

Know all men by these presents that we, George D. Cragin, as principal, and Walter Pugh, as surety, are held and firmly bound, jointly and severally, unto Christian L. Powell, Joseph Ayo, and Ludger Gaidry in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said Christian L.

Powell, Joseph Ayo, and Ludger Gaidry, heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves and each of us, by himself and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 29th day of April, in the year of our Lord eighteen hundred and eighty-five.

Whereas the said George D. Cragin, having heretofore, to wit, on the — day of ——, 187–, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the — day of ——, 18—, by the circuit court of the United States for the fifth circuit, holding sessions in and for the eastern district of Louisiana, in the suit of Christian L. Powell, Joseph Ayo, and Ludger Gaidry, No. 9177 of the docket thereof:

Now, the condition of the above obligation is that if the above-bounden George D. Cragin shall prosecute his said appeal to effect and shall answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

(Signed) G. D. CRAGIN.
WALTER PUGH.

Signed, sealed, and delivered in the presence of—
WM. GRANT.

Bond accepted May 1st, 1885.
(Signed) DON A. PARDEE, *Judge.*

113 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 112 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of C. L. Powell *et als. vs.* George D. Cragin, No. 9177 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 22 day of August, A. D. 1885.

[Seal of the U. S. Circuit Court for the 5th Circuit, Eastern District of La.]

E. R. HUNT, *Clerk.*

I, Don A. Pardee, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the

time of signing said certificate and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 22 day of August, A. D. 1885.

DON A. PARDEE, *Judge.*

Endorsed on cover: E. Louisiana C. C. U. S. No. 300. George D. Cragin, appellant, *vs.* C. L. Powell *et al.* Filed September 21, 1885.